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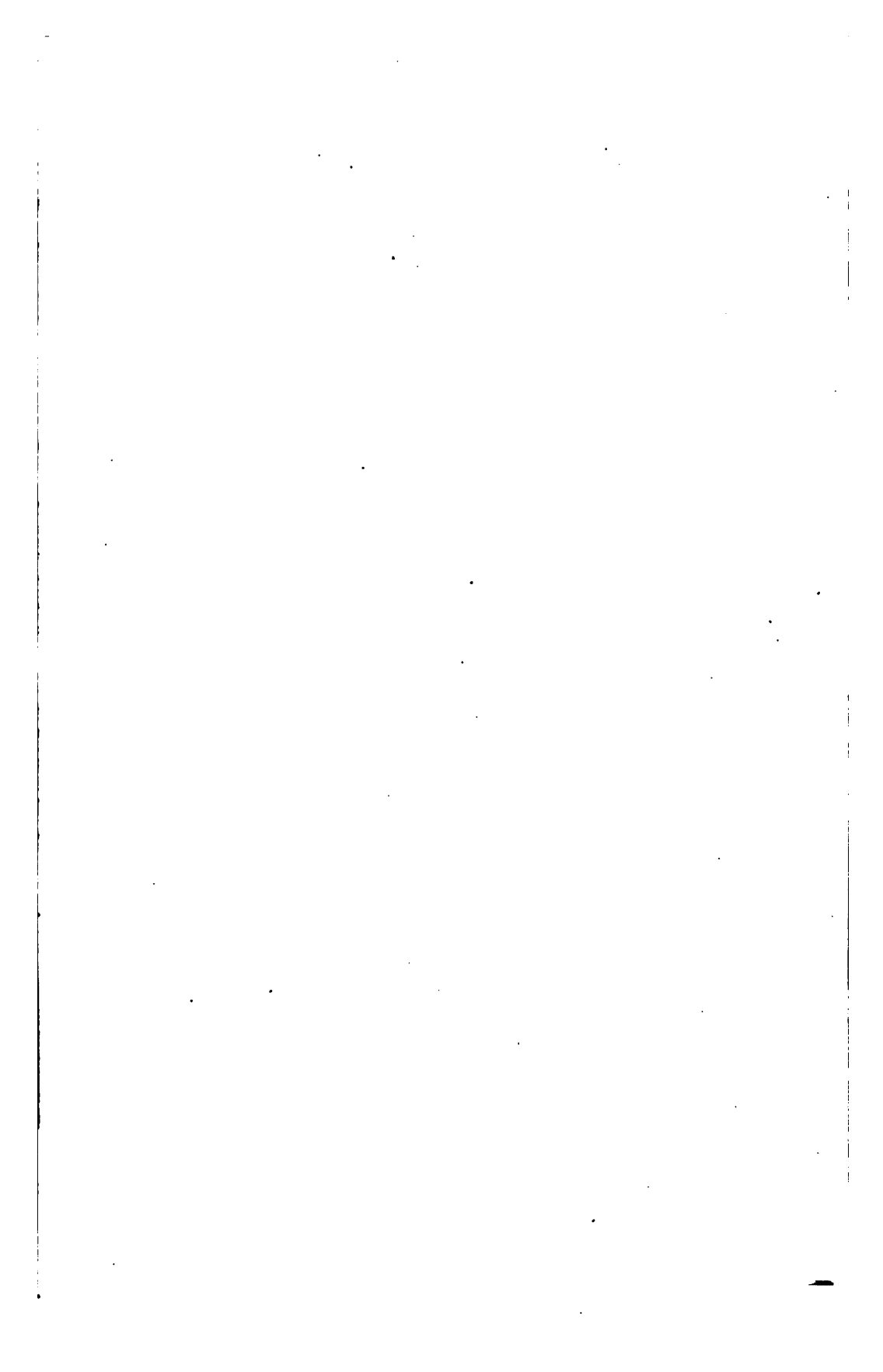


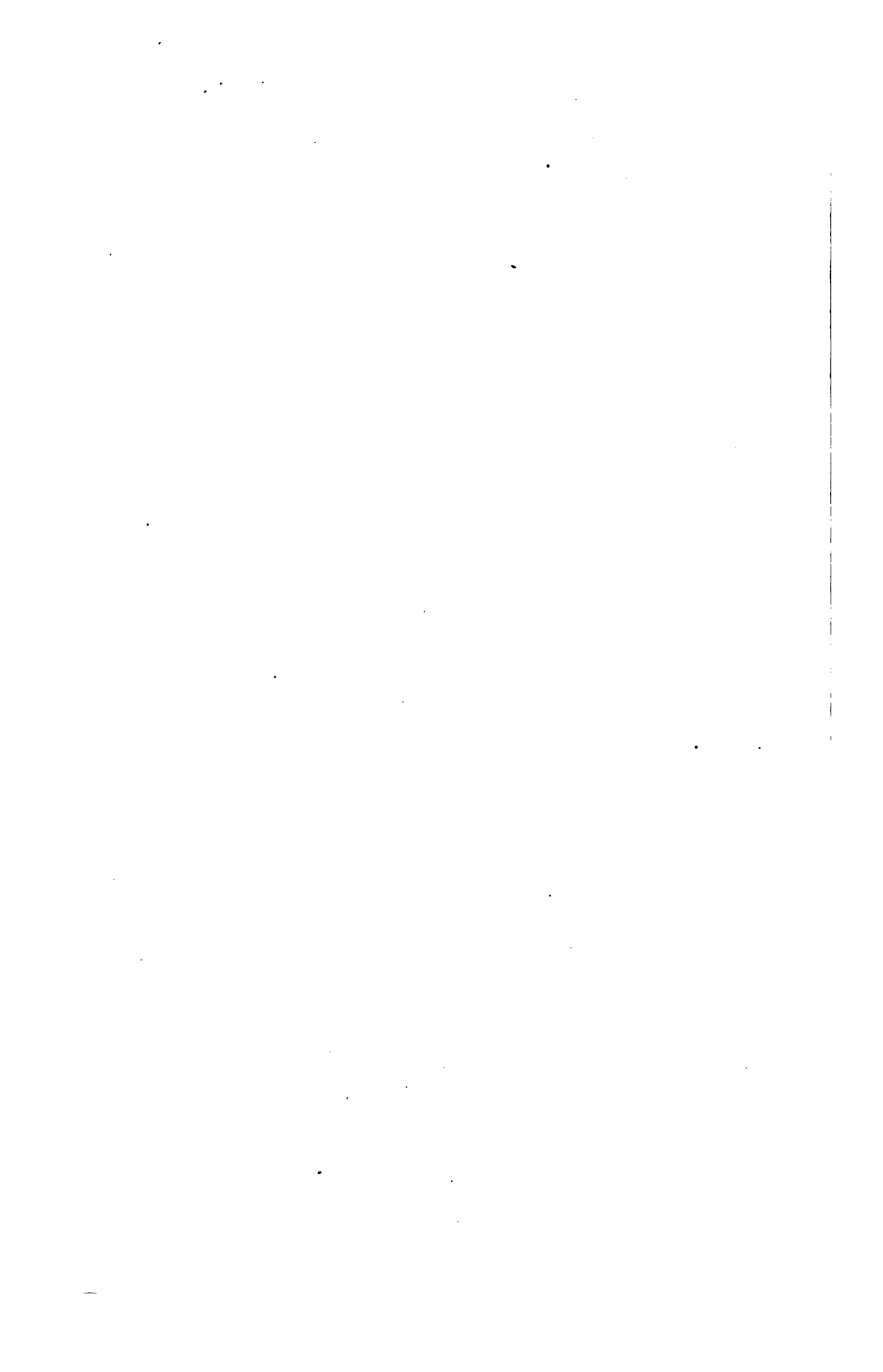
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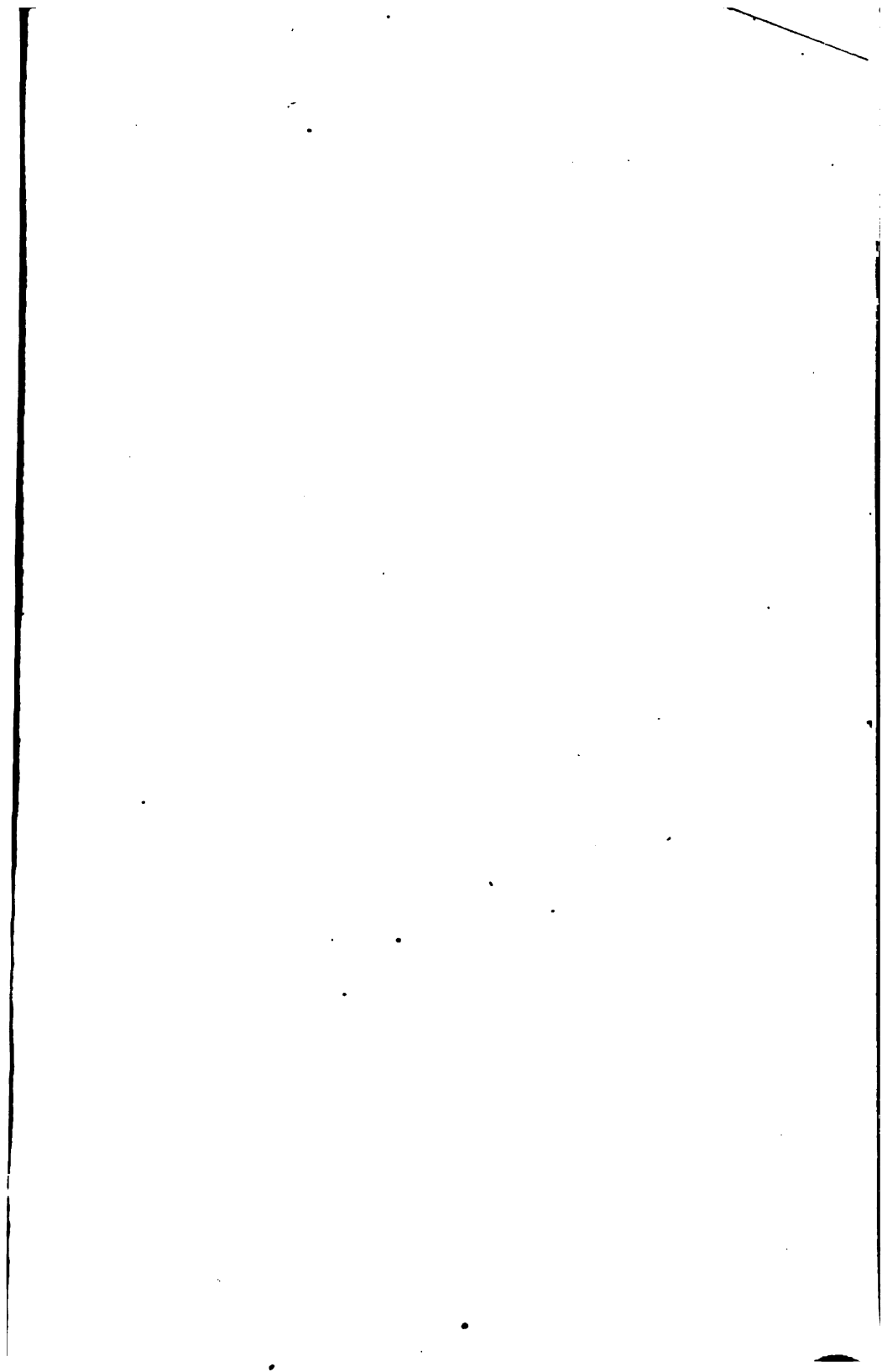
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APRIL TERM, 1918.

EASTERN DIVISION,
SEPTEMBER TERM, 1917.

MIDDLE DIVISION,
DECEMBER TERM, 1917.

FRANK M. THOMPSON,
ATTORNEY-GENERAL AND REPORTER.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
EASTERN DIVISION.

KNOXVILLE, SEPTEMBER TERM, 1917.

(Continued from Vol. 138.)

IKE POSS *v.* WILL S. ALBERT.

(Knoxville. September Term, 1917.)

1. BILLS AND NOTES. Actions. Defenses.

Acts 1907, chapter 602, section 1, declares that all property, real, personal, and mixed, shall be assessed for taxation. Section 8 provides that all personal property of every kind shall be assessed, while subsection 7 specifies for assessment all notes, duebills, choses in action, accounts, mortgages, or any other evidence of indebtedness. Section 12 requires taxpayers to fill out or cause to be filled out a schedule setting out their property not later than April 20th of each year, while section 14 provides that in any suit upon any note, bill, bond, or other chose in action subject to taxation, it shall be competent for any defendant to allege and show in defense that such note, bill, bond, or other

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chose in action was not given in, or included in, the owner's assessment for taxation for the preceding year, and upon such defense being established, the owner or holder of such note, etc., shall be taxed with all the court costs of the case, and the court shall declare, in rendering such judgment, a lien in favor of the state for taxes unpaid. *Held*, that in an action on notes not listed for taxation, recovery cannot be denied for that reason, and proof of nonlisting will merely authorize the court to impose payment of costs on plaintiff and the declaration of a lien on the recovery. (*Post*, pp. 4-7.)

Acts cited and construed: Acts 1907, ch. 602, secs. 1, 8, 12, 14, subsec. 7.

2. TAXATION. Listing for taxation. Lien.

Plaintiff demised premises for a term of years ending August 1, 1914. The lessees executed a series of rent notes, one note for each month's rent, and defaulted in payment of rent accruing after November, 1913. After the expiration of the term, plaintiff sued one of the lessees on the notes. None of the notes involved were listed by plaintiff in his schedule for taxes for the year expiring January 10th. *Held* that, though the owner of personalty has until April 20th to fill out a schedule, the taxes are assessed as of January 10th, and hence a lien for taxes can be declared only on these notes due on January 10th, and as to the other notes involved, no lien could be declared, nor could the costs of the proceedings, as to them, be assessed against plaintiff, for until such notes became due, they were part of the real property. (*Post*, pp. 7-10.)

Acts cited and construed: Acts 1907, ch. 602.

Case cited and approved: *Combs v. Combs*, 131 Tenn., 66.

3. TAXATION. Property taxable. Realty. Rent notes. Nature of.

Notes executed for rent to accrue are part of the real estate as long as held by the owner and until they mature, and as they would in event of the owner's death pass with the reversion and not as personal property, they need not be listed for taxation as personal property until maturity. (*Post*, pp. 7-10.)

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FROM HAMILTON.

Appeal from the Chancery Court of Hamilton County.—J. B. MILLIGAN, Special Chancellor.

CANTRELL & MOON, for appellant.

THOMPSON, WILLIAMS & THOMPSON, for appellee.

MR. JUSTICE GREEN delivered the opinion of the court.

In the year 1909 Poss rented to Catron and Albert a building in Chattanooga to be used for theatrical purposes. The lease ran from August 1, 1909, to August 1, 1914. The lessees executed 60 notes for \$110 each, payable in advance, for each month's rent, on the first day of each calendar month during the term.

Poss also rented to Catron and Albert two rooms in the same neighborhood from April 1, 1909, to August 1, 1914, for which the lessees executed 63 notes for \$25 each for rent payable monthly in advance on the first day of each calendar month during the term.

Catron and Albert occupied said premises for quite a while, and later the premises were occupied by subtenants of Catron and Albert with the consent of Poss. The rent notes were all paid up to Decem-

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ber 1, 1913. The subtenant occupying the premises at that time defaulted, and no payment was made on any of the remaining notes.

At the time of this default there remained outstanding 8 notes of each series. Each lease had eight months to run. Both leases expired August 1, 1914.

On September 3, 1914, Poss filed the bill in this case to recover from Will S. Albert on 8 notes for \$110 and eight notes for \$25 remaining unpaid. An answer was filed and proof taken. The chancellor rendered a decree in favor of Poss for the amount sued on, but held that Poss was liable for taxes on the said notes, and declared a lien on his recovery for taxes according to the provisions of chapter 602 of the Acts of 1907, as construed by the court.

Both parties appealed. Albert has assigned several errors challenging the propriety of the chancellor's decree against him. Poss has assigned for error that part of the chancellor's decree which held him liable for taxes on the notes in suit and declared a lien upon his recovery.

It is insisted in behalf of Albert that said notes upon which suit was brought should have been listed for taxation. It is conceded that they were not given in to the tax assessor by Poss. It is accordingly urged by Albert that a recovery on these notes is prevented by the act of 1907 just mentioned.

The said statute undertook to provide for the assessment of all property in Tennessee, and was in force at the time of the transactions here involved.

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Section 1 of chapter 602 of the Acts of 1907 provides:

"All property—real, personal and mixed—shall be assessed for taxation," etc.

Section 8 of the act provides:

"All personal property of every kind shall be assessed under the following classifications."

There are several subsections of section 8 under which personal property is attempted to be classified, and subsection 7 is as follows:

"Notes, duebills, choses in action, accounts, mortgages, or any other evidence of indebtedness, and money on hand or on deposit or invested in any manner in this State or elsewhere, and not otherwise assessed."

Section 12 of the act respecting the duties of taxpayers provides that they shall fill out or cause to be filled out a schedule prescribed, and shall swear to the same, and that said schedule fully and truly and without evasion shall set out the properties of every kind and character of the taxpayer. This shall be done not later than the 20th of April of each year.

Section 14 of the act is in these words:

"In any suit hereafter brought in any of the courts of this State upon any note, bill, bond, or other chose in action subject to taxation under the provisions of this act, it shall be competent for any defendant to such action to allege and show in defense that such note, bill, bond, or other chose in action

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was not given in or included in the owner's assessment for taxation for the preceding year, and upon such defense being established to the satisfaction of the justice, of the court, or judge directing the same, the owner or holder bringing suit upon said note, bond, bill or other chose in action, shall be taxed with all the court costs of the case, and the said court shall declare in rendering such judgment a lien in favor of the State, county, or municipality to which said unpaid taxes are shown to be payable, said lien to be discharged by a release on the docket of said court showing the payment of the said taxes, said release to be executed by the proper tax collecting officer or officers: Provided, all renewals of notes, bills, bonds, or other choses in action, shall be treated as one continuous debt; and, provided, further, that unsettled accounts shall not be included in this section."

It is insisted for Albert that the provisions authorizing a defendant "to allege and show in defense that such note, bill, bond, or other chose in action was not given in or included in the owner's assessment, means that when such defense be proven, there can be no recovery upon the instrument sued on.

An ingenious argument is made in support of this theory, but we think untenable. It is true that the statute authorizes the defense, but "upon such defense being established" it is provided that the owner of the instrument sued on shall be taxed with

the costs of the case, and the "court shall declare in rendering such judgment a lien in favor of the State, county, or municipality to which said unpaid taxes are shown to be payable."

The effect and scope of the defense authorized is thus defined by the statute. Recovery on a note is not denied, but the delinquent owner is to be assessed with costs, and his recovery is to be charged with a lien to secure the payment of the taxes due.

The judgment upon which the lien is to be fastened is undoubtedly the judgment obtained by the owner of the instrument sued on.

While the language used is not as clear as it might have been, we think the interpretation given is the most natural one. If the legislature had intended to fix upon the delinquent taxpayers such a harsh penalty as a denial of recovery upon his notes and choses in action, such a purpose would have been expressed in plain terms. We cannot ascribe this intention to the lawmakers from the language here used.

The other assignments of error interposed by Albert have been fully considered, and we are of opinion that they must be overruled. The facts appearing in the record do not sustain the defenses raised by these assignments of error. We intimated as much at the hearing, and further discussion is not necessary here.

As heretofore stated, Poss challenges the action of the chancellor in holding these notes liable for

taxes and declaring a lien upon the recovery decreed.

The notes sued upon were due respectively as follows: Two on December 1, 1913, two on January 1, 1914, and two on the first day of each calendar month thereafter up to and including July 1, 1914.

We should here observe a fact that has been apparently overlooked by counsel, which is that under chapter 602 of the Acts of 1907, section 5, subsection 1, all assessments are made "to the person or persons owning or claiming to own the same on the 10th day of January of the year for which the assessment is made, if known; if not, to unknown owners."

The owner of personalty has until the 20th of April to fill out the schedule required, but said schedule is made as of January 10th, and must show the personalty owned by him on that date. The tax is levied as of January 10th.

Section 14 heretofore quoted refers to notes, etc., not "included in the owner's assessment for taxation for the proceeding year." This means the preceding assessment year, not the preceding calendar year. For assessment purposes, the year is referred to a particular date, namely, January 10th. When a note therefore is sued on which is liable for taxation, the application of section 14 referred to must be tested by the *status* of the instrument sued on upon the 10th of January preceding.

On the 10th of January, 1914, four of the notes sued upon were due, two of each series. We think

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there is no doubt but that these notes were liable for taxation, and should have been given in by the owner some time prior to April 20, 1914. As respects these notes, the chancellor's decree was correct.

Twelve of the notes sued on, however, did not mature until after January 10, 1914. We think these notes were not liable for taxation for that year, and there was no obligation on the part of the owner to have given them in. As to these notes, the chancellor's decree was erroneous.

The provisions of chapter 602 of the Acts of 1907, upon which the chancellor's decree was based, relate altogether to the assessment of personal property. Personal property is classified, and notes, duebills, etc., there enumerated under class 7. Provision is elsewhere made in the statute for the assessment of real estate.

Notes given for rents to accrue in the future while in the owner's hand are not personal property. They are incident to the reversion and would vest in his heir if the owner died. They are part of the real estate as long as held by the owner and until they mature.

The character of such notes was considered and the authorities fully reviewed in the case of *Combs v. Combs*, 131 Tenn., 66, 173 S. W., 441. It was there held that such instruments were not personal assets out of which a widow's allowance might be set apart upon the death of her husband, but that they passed to the devisees of the realty.

Since the sections of this statute relied on relate only to personal property, and the notes here sued on which had not matured January 10, 1914, could not be so classified, default had not arisen with respect to these notes in September, 1914, when this suit was brought.

It follows that the chancellor correctly rendered a decree in favor of the complainant on all the notes. He correctly held the complainant liable for taxes on four of the notes. The remainder of the notes were not liable for taxes. The decree below will accordingly be modified to the extent indicated. One-fourth of all the costs will be paid by the complainant, and the remainder of the costs taxed to the defendant.

BIRD BROTHERS v. SOUTHERN SURETY CO. *et al.*

(Knoxville. September Term, 1917.)

1. **MECHANICS' LIENS. Notice of Claim. Time.**

A materialman or worker must either serve notice of claim within thirty days after furnishing the last material or of expiration of worker's contract, or within thirty days after completion of the building, to obtain a lien, and service of notice between such periods, even if within thirty days after abandonment of the work by the contractor, is void, under Thom. Shan. Code, section 3540. (*Post*, pp. 14-18.)

Cases cited and approved: Perkins Oil Co. v. Eberhart, 107 Tenn., 409; Cole Mfg. Co. v. Falls, 92 Tenn., 607; Basham v. Toors, 51 Ark., 309; National Surety Co. v. Price, 162 Ky., 632; Powder Co. v. Railroad, 113 Tenn., 382.

Code cited and construed: Sec. 3540 (T.S.).

2. **MECHANICS' LIENS. Notice of claim. Necessity for.**

Filing of an intervening petition, in action by owner to ascertain mechanics' liens, within thirty days after completion of a building, does not give a materialman or worker a lien when no valid notice of claim has been served, under Thom. Shan. Code, section 3540, relating to notice to owner. *Post*, pp. 18-19).

Cases cited and approved: Stone Co. v. Board of Publication, 91 Tenn., 200; Bassett v. Bertorelli, 92 Tenn., 548; Reeves v. Henderson, 90 Tenn., 522.

Code cited and construed: Sec. 3540 (T.S.).

3. **MECHANICS' LIENS. Indemnity against lien. Bond of contractor. Liability of Surety.**

A bond conditioned that surety shall indemnify the owner for "loss resulting from the enforcement of mechanics' liens" does not render the surety liable for attorney's fees and costs from attempted enforcement of liens which failed because proper notice of claim was not given. (*Post*, pp. 19-20.)

Bird Bros. v. Southern Surety Co.

FROM GREENE

Error to the Chancery Court of Greene County.
—Hal. H. HAYNES, Chancellor.

SUSONG & BIDDLE, for Bird Bros.

SHOUN & TRIM, for Knoxville Brick Co.

W. E. DRUMMOND, for Knoxville Lbr. & Mfg. Co.

A. Y. BURROWS, for Southern Surety Co.

THOMAS S. WALKER, for W. T. & Geo. Clem, J. C. Flannon, W. C. Waddell & R. C. Bird.

MR. JUSTICE GREEN delivered the opinion of the Court.

Bird Bros. entered into a contract with one W. H. Gildard to construct for them a building in the town of Greeneville for the sum of \$4,000. Gildard abandoned the job before the completion of the building, and assigned his contract to W. C. Terry & Co., who, for the purposes of this opinion, may be said to have assumed Gildard's obligations and agreed to complete this contract. The surety company made a bond to protect Bird Bros. against mechanic's liens. The Southern Surety Company was also on Gildard's bond. W. C. Terry & Co. likewise abandoned this job, and Bird Bros. themselves had to complete the building.

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The Knoxville Lumber & Manufacturing Company, the Knoxville Brick Company, and certain others hereafter referred to, furnished material which entered into the construction of this building and performed labor on the same.

After W. C. Terry & Co. abandoned the work, the Knoxville Lumber & Manufacturing Company served a notice on Bird Bros. of its intention to claim a lien upon the property. It may be conceded that this notice was served within thirty days after the abandonment of the contract by W. C. Terry & Co.

Later, notices of a lien claimed were served upon Bird Bros. by W. T. & George Clem, J. C. Flannon, and Waddell & Bird.

The Knoxville Lumber & Manufacturing Company, under provisions of section 5307, Thompson's-Shannon's Code, within ninety days after the service of its notice upon Bird Bros., filed a bill for itself and for the benefit of any other mechanics claiming a lien upon said property to subject said property to the satisfaction of said liens.

Shortly after this bill was filed, Bird Bros. the owners of the property, filed their bill against the surety company and certain of the mechanics claiming liens to have said liens ascertained, the rights of the parties fixed, and the bondsman held liable. This bill was filed according to the practice approved in *Perkins Oil Co. v. Eberhart*, 107 Tenn., 409, 64 S. W., 760.

By order of the chancellor, the suit instituted by the Knoxville Lumber & Manufacturing Company was consolidated with the suit instituted by Bird Bros. In the consolidated case intervening petitions were filed to assert mechanics' lien by Clem, Flannon, and Waddell & Bird, whose claims were above mentioned. After the completion of the building by the owners an intervening petition was filed in this consolidated case to assert a mechanic's lien by the Knoxville Brick Company.

There were some other pleadings in the case not necessary to be mentioned. Bird Bros., the owners of the property, also sought in this case a recovery against the surety company for counsel fees and other expenses to which they had been put in the litigation about the mechanics' liens.

The chancellor pronounced a decree in which he declared a lien on the property in favor of the Knoxville Lumber & Manufacturing Company and a lien in favor of the Knoxville Brick Company, but adjudged that Clem, Flannon and Waddell & Bird had not perfected their liens asserted. The chancellor also held that the surety company was liable on the bond executed by it for counsel fees incurred by Bird Bros.

All the parties mentioned have brought the case up and assigned error on the chancellor's decree so far as they are adversely affected.

We are of opinion that the Knoxville Lumber & Manufacturing Company was not entitled to the lien declared in its favor on said building. The chan-

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cellor proceeded on the idea that a notice of this claim served upon the owner within thirty days after the abandonment of the work by the contractor, W. C. Terry & Co., was adequate to fix a lien upon this property, suit being brought within ninety days after service of the notice. We are not able so to construe our statute, which is in the following words:

“Every journeyman or other person employed by such mechanic, founder, or machinist, to work on the buildings, fixtures, machinery, or improvements, or to furnish material for the same, shall have this lien for his work or material, if, within thirty days after the building is completed, or the contract of such laborer, mechanic, or workman shall expire, or he be discharged, he or they shall notify, in writing, the owner of the property on which the building or improvement is being made, or his agent or attorney, if he reside out of the county, that said lien is claimed, and said lien shall continue for the space of ninety days from the date of said notice in favor of such subcontractor, mechanic, or laborer.” Thompson’s-Shannon’s Code, section 3540.

Under this statute the notice of lien must be served upon the owner within thirty days after the building is completed or within thirty days after the contract of the laborer, mechanic, or workman shall expire. In the case of a furnisher of material he must serve his notice within thirty days after the last material is furnished, or within thirty days after the building is completed. It is not insisted that the Knox-

ville Lumber & Manufacturing Company served its notice within thirty days after the lumber was supplied.

A notice served by the furnisher of material upon the owner of the property is void if served more than thirty days after the last material is furnished and before the completion of the building. Two periods are fixed by the statute for the service of such notice: Thirty days after the last material is supplied, and thirty days after the building is completed. If given more than thirty days after the last material is furnished, it is too late, and falls without the first period. If given before the building is completed, it is premature and without the last period specified. *Cole Mfg. Co. v. Falls*, 92 Tenn., 607, 22 S. W., 856. The mechanics' lien laws of the several States are divergent in their provisions, and authorities from other jurisdictions are not helpful in the consideration of our own statutes.

It has been held in Arkansas where the law provides for a service of notice within a certain period after the job or contract has been completed that a service within due time of the abandonment of the work by the contractor is proper. *Basham v. Toors*, 51 Ark., 309, 11 S. W., 282.

On the other hand under a somewhat different statute the Kentucky court of appeals has held that the time for serving notice was to be reckoned from the last item furnished after the owner assumed charge of the work and not from the last

item furnished before the contractor abandoned the job. *National Surety Co. v. Price*, 162 Ky., 632, 172 S. W., 1072.

Construing our statute providing for a lien in favor of those doing work on railroads, which is similar in its provisions to section 3540, Thompson's-Shannon's Code, above set out, where a furnisher of material stopped a shipment in transit owing to the insolvency and abandonment of the work by the contractor, this court said:

"The fact that the last shipment was not delivered was due to the abandonment of the work by Cole & Co. and their notice of insolvency, and within ten days after the contract was terminated by the wrongful conduct of Cole & Co. and within ten days from the time when the last delivery would have been made but for their failure, the notice was given." *Powder Co. v. Railroad*, 113 Tenn., 382, 401, 83 S. W., 354, 358 (67 L. R. A., 487, 106 Am. St. Rep., 836).

Such a notice was held sufficient to fix a lien, but it was so held because it came within ten days of a time when the last material would have been delivered but for the failure of the contractor. It is not insisted that any further deliveries of material were prevented in this case by the default of W. C. Terry & Co.

Inasmuch as the Knoxville Lumber & Manufacturing Company failed to give notice of the lien claimed within thirty days of the time that the last material was furnished by it, it was then remitted

to the necessity of giving this notice within thirty days after the building was completed. No intermediate time for the serving of such notices is provided by the statutes. Mechanics' lien are purely statutory, as is well known, and our statute (Thompson's-Shannon's Code, section 3540) does not authorize any lien under the circumstances appearing in this case.

The Knoxville Brick Company filed an intervening petition in these consolidated causes asserting its lien within thirty days after the completion of this building by the owners. However, it appears that this claimant served no notice upon the owners of its intention to claim a lien.

Such failure to serve notice is in our opinion fatal to this petitioner's claim. *Stone Co. v. Board of Publication*, 91 Tenn., 200, 18 S. W., 406; *Bassett v. Bertorelli*, 92 Tenn., 548, 22 S. W., 423; *Reeves v. Henderson*, 90 Tenn., 522, 18 S. W., 242; *Cole Mfg. Co. v. Falls*, supra.

It is argued in behalf of the Knoxville Brick Company that the intervening petition filed by it within thirty days after the building was completed was in itself a notice to the owners of the building, and that no more was required. Such petition, however, was only permissible on the part of one who had perfected a lien on the property involved in the case. The petitioner had no right to a personal judgment against the owners of the property. Its only claim was against the property itself. Until notice was

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served upon the owner and a lien thus fixed, the petitioner had nothing against the property upon which it could sue. It had no standing in court—no right to assert. Suitors are ordinarily allowed to enter the courts to enforce or to redress rights, not to create rights.

Clem, Flannon, and Waddell & Bird served notices of liens claimed by them within thirty days of the abandonment of the work by W. C. Terry & Co. None of these parties, however, filed suits to enforce such liens until more than ninety days after such notices were served by them.

For two reasons, therefore, none of these claimants are entitled to a lien. Notice was not served at a proper time, nor was suit brought within the period of the statutory limitation. Thompson's-Shannon's Code, section 3540.

There has been much discussion as to whether Bird Bros. were entitled to recover their attorney's fees and other expenses from the surety company executing the bond of W. C. Terry & Co. All this has been upon the assumption that mechanics' liens would have to be discharged by the owners.

The bond is conditioned that the surety company "shall well and truly indemnify and save harmless the obligee from any pecuniary loss resulting from the enforcement of mechanics' liens against said property of the said obligee."

Since from the foregoing it appears that no mechanics' liens have been fastened on the property of

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Bird Bros., and that they cannot be put to any "pecuniary loss resulting from the enforcement of mechanics' liens," it follows that there is no liability on this bond.

The question as to the right of the owners to recover their attorney's fees as a part of such pecuniary loss consequently does not arise.

It results that the decree of the chancellor, in so far as any mechanics' liens on this property were declared and in so far as any recovery against the surety company was decreed, will be reversed. His decree with reference to the claims of Clem, Flannon, and Waddell & Bird will be affirmed. The costs of the case will be paid one-third by Bird Bros., one-third by the Knoxville Lumber & Manufacturing Company, and the other third will be divided among the Knoxville Brick Company, W. T. & Geo. Clem, J. C. Flannon, and Waddell & Bird.

MRS. D. W. HONEA v. AMERICAN COUNCIL, No. 27, J. O.
U. A. M., et al.*

(Knoxville. September Term, 1917.)

1. **INSURANCE. Fraternal insurance. Exhaustion of remedies.**

A beneficial order or association may validly stipulate that remedies must be exhausted by an appeal to a higher tribunal of the order, provided for the adjudication of claims, though it may not wholly deprive its member of the right to invoke the aid of the court of the land. (*Post*, p. 23.)

Case cited and approved: McGuinness v. Court Elm City No. 1, 78 Conn., 43.

2. **INSURANCE. Fraternal insurance. Exhaustion of remedies.**

Where the right to a funeral benefit against a fraternal order is involved, the beneficiary may sue without appealing to the judicatories within the order, though the by-laws provided for appeals therein, if they did not expressly inhibit suit in the courts before exhaustion of the remedies within the order. (*Post*, pp. 23-24.)

Case cited and approved: Benson v. Grand Lodge, B. L. H. (Ch. App.), 54 S. W., 132.

3. **INSURANCE. Fraternal insurance. Right to recover. Time of reinstatement.**

Under by-laws of fraternal order, entitling beneficiary to receive funeral benefits for the death of a member, not caused from any disease which had demonstrated itself prior to his reinstatement, the beneficiary of a member who had been suspended and whose fatal illness demonstrated itself after he applied for reinstatement but before he was finally enrolled on the books of the National Council, could not recover the death benefit. (*Post*, pp. 24-25.)

* On the validity of requirement by mutual benefit society that remedies within the order must be exhausted before resort to the civil courts see notes in 8 L. R. A. (N. S.), 916; 52 L. R. A. (N. S.), 823.

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4. INSURANCE. Fraternal insurance. By-laws. Construction.

The laws of a beneficial association or order, by which the members are bound as by contract, are to be liberally construed in favor of the indemnity of the member or his beneficiaries so as to effectuate the benevolent purpose of the order; but the construction must be of the laws as a whole, rather than of a segregated clause, and it must not be a forced one nor one that runs counter to the manifest intention of the contracting parties expressed in unambiguous terms. (*Post*, pp. 25-26.)

Case cited and approved: *Pleasants v. Locomotive Engineers, etc., Ass'n*, 70 W. Va., 389.

5. INSURANCE. Fraternal insurance. Right to benefits.

Where beneficiary of member of fraternal order who had been suspended lost right to recover against national council by delay in enrollment after reinstatement, she could not recover against the local council whose by-laws postponed right to benefits until three months after reinstatement; the member having died before expiration of such time. (*Post*, p. 26.)

FROM ROANE.

Appeal from the Chancery Court of Roane County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.
—HUGH G. KYLE, Chancellor.

J. W. STAPLES and WM. M. HANNAH, for appellant.
CASSELL & HARRIS, for appellee.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

The bill of complaint was filed against the local council and the national council of the Junior Order

of United American Mechanics, to recover \$500 claimed to be due as funeral benefits arising on the death of complainant's husband. The chancery court and the court of civil appeals denied a recovery. The case has been brought before this court by a petition for *certiorari*.

One of the defenses of the order sustained by the court of civil appeals is based upon the claim of failure on the part of the representative of deceased to exhaust remedies within the order before appealing to the courts for relief.

The laws of the funeral benefit department provide, in section 23, for an appeal from a refusal of the secretary manager of the national council to pay a death claim, and that within sixty days from the decision a bill of particulars is to be filed with that official, giving all the facts of the case, in which event the appeal and all papers are to be placed before the "national judiciary for final adjudication."

A beneficial order or association may validly stipulate that remedies must be so exhausted, as by an appeal to a higher tribunal of the order, provided for the adjudication of claims, though it may not wholly deprive its member of the right to invoke the aid of the courts of the land. *McGuinness v. Court Elm City* No. 1, 78 Conn., 43, 60 Atl., 1023, 3 Ann. Cas., 209, and note; note Ann. Cas., 1915B, 318; 7 C. J., 1121.

But a number of the courts, this court among them, hold that, where property rights are involved, as here, a member may first bring suit without appealing to

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the judicatories within the order, unless there is found incorporated in the laws of the order, or the contract, an express inhibition to the contrary. *Benson v. Grand Lodge B. L. H.* (Ch. App.), 54 S. W. 132, and cases cited 7 C. J., 1122.

There appears no such prohibition in the laws governing the funeral benefit department. We, therefore, are unable to approve the ruling made on this point by the court of civil appeals.

But it is contended by the respondents that a recovery is not awardable because of another provision in the order's laws in regard to the time of the demonstration of the disease which resulted in Honea's death. Section 15 of these laws provides:

"Immediately upon the death of a member in good standing in his council, . . . and entitled by the laws of the funeral benefit department and the constitution of his State council and the laws of his council to death benefits, and whose death is not caused . . . from any disease which had demonstrated itself prior to his enrollment or reinstatement into the funeral benefit department," payments shall be made in manner set forth.

Another provision is, in substance, that no claim shall be made for benefits upon the death of any member from a disease which "may have demonstrated itself prior to his admission to the order and his enrollment in the funeral benefit department and reinstatement therein."

Would the demonstration of disease prior to Honea's reinstatement by enrollment at headquarters of the national council defeat recovery, if it did not precede his admission to the lodge? Is the reinstatement the legal equivalent of readmission to the local lodge?

The facts illustrating this contention are as follows:

Many months prior to March 15, 1915, Honea defaulted in the payment of dues, and was suspended. In the early part of that year he made application for membership in the order by way of reinstatement. He was thus admitted into the local council on March 15, 1915, but the evidencing papers were not forwarded by the local officer to the headquarters in Pittsburgh, Pa., until the 18th. They were not received there, so that Honea's name could be enrolled, until the 20th. Between March 15th and the 20th he was confined to his bed by reason of the illness that led to his death on March 26th.

We are of opinion that the true construction of the laws quoted in that such demonstration of disease prior to reinstatement on the rolls of the national council at its headquarters prevents a recover in this case.

It is true that the laws of a beneficial association or order, by which the members are bound as by contract, are to be liberally construed, in favor of the indemnity of the member or his beneficiaries so as to effectuate the benevolent purpose of the order; but the construction must be of the laws as a whole, rather than of a segregated clause, and it must not be a

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forced one or one that runs counter to the manifest intention of the contracting parties, expressed in terms that are not fairly ambiguous. *Pleasants v. Locomotive Engineers' etc., Asso.*, 70 W. Va., 389, 73 S. E., 976, Ann. Cas., 1913E, 490, and note; 7 C. J., 1077.

Any ambiguity on the point in the clause last quoted from the laws is removed by a reading of the one first quoted.

The complainant insists that she is entitled to recover of the local council, American Council No. 27, of Harriman, whatever may be her lack of remedy against the national council; and as a part of the contention it is urged that the forwarding of the reinstatement papers was due to the neglect of the officers of the local council.

Passing the question as to complainant's right to a judgment against the local council, if it be a non-incorporated association, we think that nonliability is made manifest by the following by-law of council No. 27, which is a body of rules distinct from those of the national council:

"The person elected for reinstatement into this council shall not be considered a member until he pays the stipulated reinstatement fee, and in such case shall not be entitled to benefits until the expiration of three months."

As seen, Honea died before three months had elapsed following his readmission into the local council.

The result reached by the court of civil appeals was a correct one. Affirmed.

CINCINNATI, N. O. & T. P. Ry. Co. v. W. E. MORGAN.*

(Knoxville. September Term, 1917.)

1. **COMMERCE. Railroads engaged in "interstate commerce."**

To be within the federal Employers' Liability Act (Act Cong. April 22, 1908, chapter 149, 35 Stat. 65 [U. S. Comp. St. 1916, sections 8657-8665]), one need not be directly engaged in an interstate train movement; the test being whether his task was so directly and immediately connected therewith, as to form a part or necessary incident, even though only preliminary, thereto. (*Post*, pp. 31-32.)

Acts cited and construed: Acts 1908, ch. 149.

Cases cited and approved: New York Cent., etc., R. Co. v. Carr, 238 U. S., 260; Norfolk & Western R. Co. v. Earnest, 229 U. S., 114.

2. **COMMERCE. Railroads. Use of engine in "interstate commerce."**

Where a locomotive was habitually and exclusively used in interstate train movements, and not designated for any intrastate or mixed use, an employee working upon it was engaged in interstate commerce. (*Post*, pp. 32-33.)

Cases cited and approved: Baltimore, etc., R. Co. v. Darr, 204 Fed., 751; Law v. Ill. Cent. R. Co., 208 Fed., 869; Lloyd v. Southern R. Co., 116 N. C., 24; Smiegl v. Great Northern R. Co., 165 Wis., 57.

Case cited and distinguished: Minneapolis & St. L. R. Co. v. Winters, 242 U. S., 353.

3. **COMMERCE. Railroads. Federal Employers' Liability Act. "Interstate commerce."**

Where an engine had been specifically designated for a certain interstate train, and a hostler was told to fire and prepare the engine for such train, and while doing so was injured, he was engaged in interstate commerce within the federal Employers' Liability Act. (*Post*, pp. 33-35.)

*As to constitutionality, application and effect of Federal Employers' Liability Act see notes in 47 L. R. A. (N. S.), 38; L. R. A. 1915C, 48.

C., N. O. & T. P. Ry. Co. v. Morgan.

Cases cited and approved: *Southern R. Co. v. Puckett*, 244 U. S., 571; *Byram v. Ill. Cent. R. Co.*, 172 Iowa, 631; *Staley v. Ill. Cent. R. Co.*, 268 Ill., 356; *Lloyd v. N. C. R. Co.*, 116 N. C., 24; *Hinson v. Atlanta, etc., R. Co.*, 172 N. C., 646.

Case cited and distinguished: *N. C. R. Co. v. Zachary*, 232 U. S., 248.

4. **MASTER AND SERVANT. Negligence. Question for jury.**

Where an engine hostler was struck and injured by the dropping of a hood on a smokestack by an inspector of equipment, the question of negligence of the company was one of fact for the jury, on the inference that the inspector or his helpers, if exercising due care, would have seen the hostler and avoided the injury. (*Post*, pp. 35-36.)

5. **MASTER AND SERVANT. Contributory negligence not precluding recovery.**

Where a servant was guilty of contributory negligence, his recovery is not precluded by the federal Employers' Liability Act. (*Post*, p. 36.)

FROM MORGAN

Appeal from the Circuit Court of Morgan County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—
XEN HICKS, Judge.

HORACE M. CARR, for appellants.

CASELL & HARRIS, for appellee.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

This suit was brought by Morgan to recover damages for personal injuries; the action being founded

on the federal Employers' Liability Act. He was granted a judgment based on the verdict of a jury in the circuit court, after a motion of the defendant railway company for peremptory instructions had been overruled. On appeal the court of civil appeals, reversing the judgment, sustained the motion for instructed verdict, and dismissed the suit.

A petition for *certiorari* was filed by Morgan under which we ordered and have heard oral argument.

An underlying question is whether Morgan was employed at the time he was injured in work which brings his case within the act of Congress upon which it is based.

He was a hostler in the yards of the railway company at Oakdale, Tenn., which is a division terminal. He was engaged at night work, firing engine No. 813, which by bulletin announcement or by a call (known to Morgan) had been designated to pull an interstate passenger train from Oakdale to Danville, Ky. Engines of its class—the 800 class—were to all intents and purposes used exclusively and habitually in runs north from Oakdale to Danville. Narrow bridges to the south prevented the use of that class in journeys to Chattanooga, Tenn., the next division point in that direction. Engine No. 813 had come in from Danville pulling train No. 15, and after lying at Oakdale for thirteen and one-half hours was to pull return train No. 16 to Danville. In the meantime the accident to Morgan happened.

It appears that in firing the engine a blowpipe was used, and that it was inserted by Morgan in the smokestack and left for some time. When the hostler returned and was removing the blower, it struck against the stack, and one of its sections became detached and fell back into the boiler. Morgan then went to get Jones, the boilermaker of defendant, to supervise opening a door in the head of the boiler in order to admit of a helper going in and recovering this detached section of pipe.

It appears that the inspector of equipment who was engaged in inspecting a nearby engine saw Morgan leave engine No. 813, and the inspector proceeded to the latter locomotive to test its air appliances and other mechanical equipment, as was his duty after it had been fired up. There is some evidence to the effect that an assistant was on the cab of engine 813 with the inspector—on the left side. While the inspectors were on the cab of the engine, Morgan, Jones, and a helper returned, and after the boilerhead had been opened Morgan ascended the pilot and was standing in front of the smokestack, where, leaning over, he reached down to receive the section of the blower pipe as it would be handed up to him by the helper who had crawled within. In this position Morgan was struck by a heavy oval metal hood which was attached to the smokestack for use as a fender to protect the enginemen from gusts of smoke and cinders as the locomotive ran through tunnels on defendant's line of railway. This hood was suddenly

moved in his test of its working condition by the inspector from his place in the cab. The inspector did not know of the presence of Morgan on the boiler when he turned the valve that operated the hood. He could only have seen Morgan by putting his own head out of the cab window. He was on the right side; but his helper was on the opposite side, and Morgan stood toward the left side of the smokestack.

On the fundamental question we are of opinion that Morgan was, at the time he was injured, engaged at a task that falls within the scope of the federal Employers' Liability Act. All that he did looked to the firing of the engine and turning it over in proper condition to be attached to and as a part of an interstate train.

Each case based on the act must be decided in the light of its own facts, and necessarily there arise many border-line cases. The test by which to determine whether, at the time of a given injury, the employee was engaged in an interstate commerce transaction is: Was his act one which was so directly and immediately connected with such business as substantially to form a part or a necessary incident thereof? *New York Cent., etc., R. Co. v. Carr*, 238 U. S., 260, 35 Sup. Ct., 780, 59 L. Ed., 1298.

In order to bring the employee within the protection of the act, it is not necessary that he be directly engaged in an interstate train movement, since his task may be but an incident, preliminary but necessary, to that movement. In *Norfolk & Western R. Co. v.*

Earnest, 229 U. S., 114, 33 Sup. Ct., 654, 57 L. Ed., 1096, Ann. Cas., 1914C, 172, the employee whose action was sustained was injured while piloting a locomotive through the yard, by walking ahead of it, to the main track, where it was to be attached to an interstate train.

The railway company mainly relies upon the recent case of *Minneapolis & St. L. R. Co., v. Winters*, 242 U. S., 353, 37 Sup. Ct., 170, 61 L. Ed., 358, where it was held that a machinist's helper engaged in the making of repairs in a roundhouse upon an engine which had been used in hauling trains which had carried both intrastate and interstate freight, and which was used in like service after the accident, was not then employed in interstate commerce within the meaning of the act. It was said:

"An engine, as such is not permanently devoted to any kind of traffic and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time, not upon remote probabilities or upon accidental later events."

We understand this to mean that an engine may be designated or "destined" for interstate business, so as to bring one engaged at work on it within the protection of the act, even before it begins to move on an interstate journey. We are of opinion that such designation is to be found in this case in either of two aspects:

(a) The locomotive was habitually and exclusively used in interstate train movements, and such use involves an initial designation which continues to impress upon the engine the character of an instrumentality of interstate commerce until by some affirmative act of the railway company it is diverted into an intrastate or mixed channel. *Baltimore, etc., R. Co. v. Darr*, 204 Fed., 715, 124 C. C. A., 565, 47 L. R. A. (N. S.), 4; *Law v. Ill. Cent. R. Co.*, 208 Fed., 869, 126 C. C. A., 27, L. R. A., 1915C, 17; *Lloyd v. Southern R. Co.*, 166 N. C., 24, 81 S. E., 1003; *Smiegil v. Great Northern R. Co.*, 165 Wis., 57, 160 N. W., 1057; *Richey on Federal Emp. Liability* (2 Ed.), section 40.

(b) It appears, further, that there was a specific designation of the engine in question for an interstate journey before Morgan began to fire it. Would the benefits of the act be denied to the regular fireman who followed Morgan by a few minutes and who, let us assume, was injured while engaged in opening the furnace door to replenish the fire before the engine was moved; or again, to the engineer while in the act of pulling the throttle? We can see no substance in

any attempted distinction. If one of three be so engaged in interstate commerce, so are the other two.

Certain it is that under the ruling of the supreme court of the United States, a distinction cannot be founded on the fact that a hostler is one engaged in taking preparatory steps, or doing work that is preliminary to an interstate train trip. In *North Carolina R. Co. v. Zachary*, 232 U. S., 248, 34 Sup. Ct., 305, 58 L. Ed., 591, Ann. Cas., 1914C, 159, it was recognized that work in preparing instrumentalities of interstate commerce for immediate use therein is so intimately related to such commerce as to become a part of it. It was said:

“It is argued that because, so far as appears, deceased had not previously participated in any movement of interstate freight, and the through cars had not as yet been attached to his engine, his employment in interstate commerce was still *in futuro*. It seems to us, however, that his acts in inspecting, oiling, firing, and preparing his engine for the trip to Selma were acts performed as a part of interstate commerce, and the circumstance that the interstate freight cars had not yet been coupled up is legally insignificant.”

See, also, *Southern R. Co. v. Puckett*, 244 U. S., 571, 37 S. Ct., 703, 61 L. Ed., 1321, and cases cited; *Byram v. Ill. Cent. R. Co.*, 172 Iowa, 631, 154 N. W., 1006; *Staley v. Ill. Cent. R. Co.*, 268 Ill., 356, 109 N. E., 342, L. R. A., 1916A, 450; *Lloyd v. North Carolina R. Co.*, supra; *Hinson v. Atlanta, etc., R. Co.*, 172 N. C., 646, 90 S. E., 772.

The character of the engine, therefore, did not depend on any probability or upon any accidental later event. The test event of designation preceded Morgan's going upon it, and we think firmly fixed its *status* as an instrumentality of interstate commerce, so far as his rights are concerned. How else could Morgan have viewed it after having been directed to fire the locomotive for a trip to Danville, Ky.? The chance that there would be a countermand of the order of designation was itself, if a probability, then, one too remote for consideration, as a practical question; and until in fact given Morgan's *status* for recovery, it seems, would not be changed. At the moment of the injury that *status* was one controlled by the act.

The court of civil appeals erred, therefore, in holding that Morgan was not engaged in a work of interstate commerce when injured.

For the railway company it is contended that no negligence on its part is shown, since the inspector or inspectors had a right to assume that Morgan had passed to another engine, and would not again be at engine No. 813.

We shall not go into a detailed discussion of this question of fact, or further than to say that the jury might have inferred that if Morgan, standing at a place on the boiler about the front of the smokestack, was not visible to the chief inspector at the time the hood was pulled down, yet that one of the three men,

Jones, his assistant, or Morgan, might have been seen about the engine at work by the inspector or his assistant had they been in the exercise of due care. The inspector in his testimony admits that it was his duty to look out to see whether his work could be done in safety to others. The presence of others at the front of the engine if discovered might have caused more caution on the part of the inspector and his assistant, and prevented the happening of the accident.

Morgan was guilty of contributory negligence, but under the terms of the act that does not bar a recovery.

We are of opinion, therefore, that the court of civil appeals committed further error in ruling that no negligence on the part of the railway company was shown.

Reverse the judgment of that court, and affirm the judgment of the circuit court. Costs incident to appeal are awarded appellee Morgan.

SOUTHERN RAILWAY CO. v. LEWIS & ADCOCK CO.*

(Knoxville. September Term, 1917.)

1. **CARRIERS. Interstate. Discrimination. Carrier's liability.**

An agreement by a carrier to pay damages, not occurring on its lines, to goods shipped under a bill of lading providing that no carrier shall be liable for loss other than on its own lines, is a discrimination against the uniformity of responsibility required of carriers of interstate commerce, and is unenforceable. (*Post*, pp. 39-42.)

Cases cited and distinguished: *M., K. & T. R. Co. v. Ward*, 244 U. S., 383; *Georgia, F. & A. R. Co. v. Blish Milling Co.*, 241 U. S., 190; *Southern R. Co. v. Prescott*, 240 U. S., 632; *Atchison, T. & S. F. R. Co. v. Harold*, 241 U. S., 371; *C. & A. R. Co. v. Kirby*, 225 U. S., 155.

2. **CARRIERS. Bills of lading. Limiting liability of connecting carriers.**

Carmack Amendment (Act Cong. Feb. 4, 1887, chapter 104, section 20, 24 Stat. 386, as amended by Act Cong. June 29, 1906, chapter 3591, section 7, pars. 11, 12, 34 Stat. 595 [U. S. Comp. St. 1916, sections 8604a, 8604aa]), creating in initial carriers unity of responsibility for transportation to destination, does not preclude limiting the responsibility to shipper by a connecting carrier to damages on its own lines, and such limitation is good at common law. (*Post*, pp. 42-43).

Acts cited and construed: Acts 1887, ch. 104; Acts 1906, ch. 3591, sec. 7, pars. 11, 12.

Cases cited and approved: *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S., 186; *M., K. & T. R. Co. v. Ward*, 244 U. S., 383.

3. **EVIDENCE. Filing bill of lading with interstate commerce commission. Presumption.**

There is a presumption that copies of forms of bills of lading in use by interstate carriers have been filed with the Interstate Commerce Commission. (*Post*, p. 43.)

*The question of liability of connecting carrier for loss beyond its own line is discussed in note in 31 L. R. A. (N. S.), 7.

On the effect of Carmack Amendment on carrier's liability see note in L. R. A. 1917A, 193, 265.

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Case cited and approved: Louisville & Nashville R. Co. v. Hobbs, 136 Tenn., 512.

4. CARRIERS. Connecting carriers. Actions. Estoppel.

A connecting carrier is not estopped to rely on a provision in a bill of lading, limiting liability to loss occurring on its own lines, to defeat recovery on an unlawful contract made by its agent to pay such loss on interstate shipment. (*Post*, pp. 43-44.)

5. APPEAL AND ERROR. Assignment of error. Sufficiency.

An assignment, to the effect that the trial court erred in not peremptorily instructing the jury is equivalent to an assignment that there was no evidence to support the verdict. (*Post*, p. 44.)

Cases cited and approved: Southern Ice Co. v. Black, 136 Tenn., 401; Railroad v. Bonham, 130 Tenn., 435.

FROM KNOX.

Appeal from the Circuit Court of Knox County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—
VON A. HUFFAKER, Judge.

ROSCOE WORD and J. M. MEEK, for appellants.

A. C. GRIMM, for appellee.

MR. JUSTICE GREEN delivered the opinion of the Court.

This suit was brought by Lewis & Adcock to recover \$150, the amount of damage claimed to have been suffered by a carload of oats. The oats were shipped from the Richter Grain Company in Cincinnati, Ohio, to the plaintiffs below at Knoxville, Tenn.,

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on a uniform through bill of lading. The car was routed over the Cincinnati, New Orleans & Texas Pacific Railroad and the Southern Railway Company.

The proof showed clearly that the grain was damaged prior to its delivery to the Southern Railway Company. This fact is not controverted.

The plaintiffs below introduced proof tending to show that they had made a claim against the Southern Railway Company for damage to this shipment, and that an agent of the Southern Railway Company had agreed to pay them for this damage \$150. This was denied by the railway company.

The railway company also relied on a stipulation in the bill of lading as follows:

“No carrier shall be liable for loss, damage or injury not occurring on its own road, or its portion of the route, nor after said property has been delivered to the next carrier except as such liability is, or may be imposed by law.”

There was a judgment against the railway company for \$150, the amount sued for, in the court below and this judgment was affirmed by the court of civil appeals. A petition for *certiorari* has been granted by this court and the case heard by us.

It may be conceded that there is sufficient evidence in the record to sustain the finding of the jury establishing the agreement between Lewis & Adcock and the claim agent of the Southern Railway Company, whereby the railway company undertook to

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pay \$150 for the damage sustained by this carload of oats.

Nevertheless it is contended by the railway company that if such an agreement was made, it was illegal and beyond the power of the carrier or any of its agents. We think this contention must be upheld.

Recent decisions of the supreme court of the United States construing the Acts of Congress declare that there must be uniformity in rates, uniformity in service, and uniformity of responsibility on the part of all carriers engaged in interstate commerce. The duties and responsibilities of such carriers are defined in the contracts or bills of lading filed with the Interstate Commerce Commission and the Acts of Congress, and these duties and liabilities may not be varied either by act of the carrier or the shipper, or indeed by State laws. *Missouri, K. & T. R. Co. v. Ward*, 244 U. S., 383, 37 Sup. Ct., 617, 61 L. Ed., 1213; *Georgia, F. & A. R. Co. v. Blish Milling Co.*, 241 U. S., 190, 36 Sup. Ct., 541, 60 L. Ed., 948; *Southern R. Co. v. Prescott*, 240 U. S., 632, 36 Sup. Ct., 469, 60 L. Ed., 836; *Atchison, T. & S. F. R. Co. v. Robinson*, 233 U. S., 173, 34 Sup. Ct., 556, 58 L. Ed., 901; *Atchison, T. & S. F. R. Co. v. Harold*, 241 U. S., 371, 36 Sup. Ct., 665, 60 L. Ed., 1050; *Chicago & A. R. Co. v. Kirby*, 225 U. S., 155, 32 Sup. Ct., 648, 56 L. Ed., 1033, Ann. Cas., 1914A, 501.

In *Chicago & A. R. Co. v. Kirby*, supra, the carrier undertook to make a contract with the consignor for

an expedited shipment of horses from a point in Illinois to New York City. This was a special contract, no form of which was on file with the Interstate Commerce Commission, and by the terms of which a preference or advantage was given to the shipper. Such contract was held to be illegal.

In *Georgia, F. & A. R. Co. v. Blish Milling Co.*, supra, in discussing a provision of an interstate bill of lading, which it was urged the carrier had waived, the court said:

“But the parties could not waive the terms of the contract under which the shipment was made pursuant to the federal act; nor could the carrier, by its conduct, give the shipper the right to ignore these terms which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under published tariffs and regulations. A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed.”

In *Southern Railway Co. v. Prescott*, supra, the court said: “It is also clear that with respect to the service governed by the federal statute the parties were not at liberty to alter the terms of the service as fixed by the filed regulations. This has repeatedly been held with respect to rates (citing authorities), and the established principle applies equally to any stipulation attempting to alter the provisions as fixed by the published rules relating to any of the services

within the purview of the act (citing authorities). This is the plain purpose of the statute in order to shut the door to all contrivances in violation of its provisions against preferences and discriminations."

In *Atchison, T. & S. F. R. Co. v. Harold*, supra, the court said that the view pointed out in the previous decisions with respect to congressional legislation upon this subject was "that its prime object was to bring about a uniform rule of responsibility as to interstate commerce and interstate commerce bills of lading."

In *Atchison, T. & S. F. R. Co. v. Robinson*, supra, the court denied the power of a carrier to enter into a verbal contract for an interstate shipment different in terms from the contracts on file with the Commission.

In *Missouri, K. & T. R. Co. v. Ward*, supra, the court reannounced the rule laid down in *Georgia, F. & A. R. Co. v. Blish*, and held that the parties could not waive the terms of the contract under which shipment was made pursuant to the federal act.

As heretofore seen, the contract in this case provided that no carrier should be liable for loss, damage, or injury not occurring on its own road, or its portion of the route, except as such liability is, or may be, imposed by law.

The Carmack Amendment was enacted to create in the initial carrier unity of responsibility for the transportation to its destination. *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S., 186, 31 Sup. Ct., 164,

55 L. Ed., 167, 31 L. R. A. (N. S.), 7; *Missouri, K. & T. R. Co. v. Ward*, 244 U. S., 383, 37 Sup. Ct., 617, 61 L. Ed., 1213, and cases cited.

The Carmack Amendment does not preclude a limitation of responsibility to a shipper by a connecting carrier for damages not occurring on its own line. Such limitation is good at common law.

The presumption is that the bill of lading here exhibited has been duly filed with the Interstate Commerce Commission. *Louisville & Nashville R. Co. v. Hobbs*, 136 Tenn., 512, 190 S. W., 461.

We must conclude, therefore, under the authorities heretofore cited, that the remedies of the shipper are confined to those prescribed in the bill of lading or contract. The shipper can demand no more than he is entitled to under such contract, nor can the carrier voluntarily assume any additional obligation in favor of a particular shipper.

The court of civil appeals was of opinion that the defendant railway company was estopped to rely on this provision of the contract in view of the fact that the plaintiffs had, by reason of the alleged promise to settle, probably lost their remedy against the carrier or party responsible for this damage. As we have seen, however, the cases hold that the carrier cannot waive the terms of the contract, nor do we think any estoppel could arise by reason of its conduct.

Estoppel is founded in equity. It can never be asserted to uphold fraud or wrong of any character. 10 R. C. L., 690; 16 Cyc., 747.

Under the Acts of Congress it is unlawful for any shipper to receive any benefit or advantage to which all other shippers are not entitled at the hands of a carrier. An estoppel cannot be invoked to obtain for a shipper an unlawful preference.

It is urged on behalf of Lewis & Adcock that the question discussed has not been properly presented for the consideration of this court under our rules. It is said that there is no assignment of error here to the effect that there was no evidence to sustain the judgment in the lower court.

There is, however, an assignment of error in this court as follows:

“The court of civil appeals was in error in holding that the circuit court was not in error in overruling defendant’s motion made at the close of all the evidence to peremptorily instruct the jury to return a verdict in its favor.”

An assignment to the effect that the trial court erred in not peremptorily instructing the jury is equivalent to an assignment of error that there was no evidence to support the verdict since under our practice there could be no peremptory instructions unless there was no evidence to the contrary.

Such a motion is sufficiently broad to cover the questions made by the railway company in this case. *Southern Ice Co. v. Black*, 136 Tenn., 401, 189 S. W., 861, Ann. Cas., 1917E, 695; *Railroad v. Bonham*, 130 Tenn., 435, 171 S. W., 79.

It follows that the judgment of the lower courts will be reversed, and the suit dismissed.

CITY OF KNOXVILLE v. ED. D. CONNORS.

(Knoxville. September Term, 1917.)

1. CERTIORARI. Review. Law of case.

A former determination by the supreme court in the same proceedings that petitioner who was removed from the office of chief of police was a civil service employee entitled under the charter of the municipality to have charges formulated and preferred against him, and to a trial before removal, is conclusive in subsequent proceedings as the law of the case. (*Post*, pp. 47-49.)

Cases cited and approved: *Connors v. City of Knoxville*, 136 Tenn., 428.

2. CERTIORARI. Writ. Issuance. Discretion.

While the issuance of a writ of *certiorari* is a matter within the discretion of the court, and a writ may be refused which would otherwise be issued where substantial justice has been reached by an inferior tribunal, or where public inconvenience or confusion would follow the writ, yet where the supreme court had found that one removed from the office of chief of police of a city was entitled to *certiorari* to review the removal, the contention that the court in its discretion might decline to entertain the writ is foreclosed. (*Post*, pp. 49-50.)

Cases cited and approved: *State v. Taxing District*, 84 Tenn., 240; *May v. Campbell*, 1 Tenn., 61; *People v. Brooklyn Assessors*, 39 N. Y., 81; *People v. Brooklyn Fire Comm.*, 103 N. Y., 370; *Farrington R. W. Power Co. v. Berkshire County Com'rs*, 112 Mass., 206; *State ex rel. Hamilton v. Guinotte*, 156 Mo., 513.

Case cited and distinguished: *Harris v. Barber*, 129 U. S., 366.

3. CERTIORARI. Writ. Scope of relief.

Where it was found on writ of *certiorari* that removal of petitioner from the office of chief of police was unauthorized because he was not accorded trial as required by the city's charter,

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and charges were not preferred against him, the order of removal should be quashed, but the court is without jurisdiction to direct a reinstatement of petitioner, for that would unduly extend the writ and grant relief beyond the scope of the pleadings. (*Post*, pp. 50-51.)

FROM KNOX.

Appeal from the Circuit Court of Knox County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—VON A. HUFFAKER, Judge.

CHAS. T. CATES, JR., W. T. KENNERLY and J. PIKE POWERS, JR., for appellant.

L. D. SMITH, JOHN W. GREEN and REUBEN L. CATES, for appellee.

MR. JUSTICE GREEN delivered the opinion of the Court.

This case is again before us. It involves an attempt by Ed. D. Connors, formerly chief of police of the city of Knoxville, to review the action of the municipal authorities in removing him from that office.

Connors filed a petition for *certiorari* alleging that he was removed without any hearing by the city council of Knoxville; that he was entitled to a hearing under civil service provisions of the city's charter, and he sought to have the proceedings removing him quashed on this petition to the circuit court of Knox coun-

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ty. That court held that the petition did not lie, which action was affirmed by the court of civil appeals, and the case came to this court at the September term, 1916. *Connors v. City of Knoxville*, 136 Tenn., 428, 189 S. W., 870.

This court was of opinion that Connors was entitled to a hearing; that his tenure of office was protected by the civil service provisions of the city's charter, and that common-law *certiorari* would lie to review the action of the city council in removing Connors from office summarily. The case was remanded to the circuit court, with directions to issue the writ "to remove the proceeding from the inferior board for the purpose of revision, not for a trial *de novo*, but for review of the record to be certified from the inferior tribunal, and for judgment of quashal or affirmance." *Connors v. City of Knoxville*, *supra*.

The case accordingly went back, and an answer was filed by the city of Knoxville and a large amount of proof taken, the greater part of which was entirely beyond the scope of the investigation that should have been made to conform to the opinion of this court.

The writ ordered to be issued by this court was a common-law writ of *certiorari*, not a statutory writ. The only question open for investigation of the circuit judge was whether or not the city council had acted legally in removing Connors.

We held on the former hearing that Connors was entitled under the charter of Knoxville to have a trial, and to have charges formulated and preferred against

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him, and could not be summarily removed. That question was foreclosed by the former opinion of the court. The law of this case was declared, and we will not consider it again.

The circuit judge found that the proceedings against Connors were not had upon notice, and that he had no trial. This finding is abundantly sustained by the evidence. No charges were filed against him, and no notice that he would be tried was given him. He was told that he was to be removed, and he was present at the meeting of the city council when he was removed. It was never intended, though, to have a trial, for, as a matter of fact, the majority of the commissioners thought that Connors was not within the civil service clause of the charter.

It was also contended at the trial before the circuit judge that Connors was not removed from office, but was merely transferred from one place to another in the same department. He was removed from the office of chief of police at a salary of \$125 per month and made market master at a salary of \$90 per month. The testimony of the mayor discloses that this action with reference to Connors was not intended as a transfer from one place to another for the good of the service; on the contrary, it was thought desirable to remove Connors from the office of chief of police, but the other position appears to have been given him merely through motives of sympathy.

Although reaching the conclusion that the city council acted illegally in removing Connors in that he did

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not have a trial with charges preferred against him, and that he was not transferred, but was actually removed, within the prohibition of the civil service clause, the circuit judge thought inasmuch as in his opinion Connors was a person unsuitable for the office of chief of police, his petition for *certiorari* should be dismissed.

In this the circuit judge was in error, and the court of civil appeals properly so held.

It is true that the issuance of a writ of *certiorari* is a matter within the discretion of the court. A writ may be refused which would otherwise issue, where substantial justice has been reached by an inferior tribunal, or where public inconvenience or confusion would follow the writ. *State v. Taxing District*, 84 Tenn. (16 Lea.), 240; *May v. Campbell*, 110 Tenn. (1 Overt.), 61; 5 R. C. L., p. 255.

The time for invoking the discretion of the court, however, in this case had passed when the testimony reflecting on Connors was brought out.

When this case was formerly heard, the issuance of the writ of *certiorari* was opposed on the theory that Connors was not protected by the civil service provisions of the charter of Knoxville; that the writ would not lie in view of the fact that an appeal from the action of the city council to the circuit court was provided; and it was further suggested that Connors had not been removed from office, but merely transferred as is again argued. The matter of his incompetency or unworthiness was not brought to the atten-

tion of the court. The case was presented on questions of law indicated, and this court directed the circuit judge to issue this writ of *certiorari*.

In other words, we had already exercised our discretion before this appeal to discretion was made. The great weight of authority is to the effect that when the writ of *certiorari* is once issued, the discretionary nature of the matter has passed. The supreme court of the United States has said:

“Although the granting of the writ of *certiorari* rests in the discretion of the court, yet, after the writ has been granted, and the record certified in obedience to it, the questions arising upon that record must be determined according to fixed rules of law, and their determination is reviewable on error.” *Harris v. Barber*, 129 U. S., 366, 9 Sup. Ct., 314, 32 L. Ed., 697.

To like effect, see *People v. Brooklyn Assessors*, 39 N. Y., 81; *People v. Brooklyn Fire Commissioners*, 103 N. Y., 370, 8 N. E., 730; *Farrington R. W. Power Co. v. Berkshire County Com'rs*, 112 Mass., 206, 212; *State ex rel. Hamilton v. Guinotte*, 156 Mo., 513, 57 S. W., 281, 50 L. R. A., 787.

Having found that the city council did not act legally in its removal of Connors, the trial judge should have quashed the proceedings of that body. The court of civil appeals so held, and its decree will be affirmed to that extent.

The decree of the court of civil appeals, however, went further and undertook to order a reinstatement of Connors into his office. This order was beyond the

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scope of the pleadings. It unduly extended the function of the writ of *certiorari*. Judgment of this court will be that the proceedings of the city council of Knoxville by which Connors was removed are void and such proceedings are quashed. His legal rights are certainly indicated with sufficient clearness in the two opinions of this court. For the vindication of these rights he must resort to appropriate remedies.

We think the costs of the case were properly divided by the court of civil appeals for the reasons stated by that court.

WILLIAM ALEXANDER v. VIRGINIA & S. W. RY. CO.

(*Knoxville*. September Term, 1917.)

1. RAILROADS. Signals. Sufficiency of evidence.

The statement of a witness that the whistle was not sounded "until it blew inside the corporation here" and of another that he lives one and one-half miles from Rogersville and one mile from the spring, not giving relative location of each and of depot, does not locate city limits or establish defendant's failure to comply with Thompson's Shannon's Code, section 1574, subsection 3, as to giving signals before reaching and while passing through incorporated cities. (*Post*, pp. 53-54.)

Cases cited and approved: Railroad v. Collier, 104 Tenn., 189; Webb v. Railroad Co., 88 Tenn., 119.

Code cited and construed: Sec. 1574, subsec. 3. (T.-S.).

2. EVIDENCE. Judicial notice. Incorporated cities.

While a court will take judicial notice of the fact of incorporation of a city incorporated by state law, it cannot take judicial notice of the location of the boundaries thereof. (*Post*, pp. 54-55.)

Cases cited and approved: State v. Murfreesboro, 30 Tenn., 217; Coal Creek Co. v. East Tenn. Co., 105 Tenn., 563; Frazier v. Railroad Co., 88 Tenn., 138.

FROM HAWKINS.

Appeal from the Circuit Court of Hawkins County.—DANA HARMON, Judge.

NEIGHBORS & NEIGHBORS and BOWEN & THOMPSON,
for appellant.

J. O. PHILLIPS and SUSONG & BIDDLE, for appellee.

MR. JUSTICE LANSDEN delivered the opinion of the Court.

This suit was brought by Alexander, administrator of Oliver Mitchell, deceased, to recover damages for personal injuries resulting in the death of Mitchell, upon the following facts:

The line of railroad of the defendant company runs from Rogersville to Bulls Gap. It is averred in the declaration that Rogersville is an incorporated town, and it was the duty of the defendant to comply with subsection 3 of section 1574 of Thompson's-Shannon's Code, which is as follows:

"On approaching a city or town, the bell or whistle shall be sounded when the train is at the distance of one mile, and at short intervals till it reaches its depot or station; and on leaving a town or city, the bell or whistle shall be sounded when the train starts, and at intervals till it has left the corporate limits."

The question to be treated of in this opinion is whether the statutory provision above quoted has application to this case. There is no proof in the record of the location of the corporate limits of the town of Rogersville, and there is no direct proof that Rogersville is an incorporated town. One witness says the whistle was not blown "until it blew inside the corporation here," and another witness says that deceased sometimes worked for the "corporation." Another witness says that he lives one and one-half

miles from Rogersville and one mile from the spring. From this last statement the inference is sought to be made that the spring is one-half mile from Rogersville. Manifestly, however, this inference is not warranted upon the facts stated because the distance that the depot is from the spring would depend entirely upon the relative positions of the witness's home, the depot, and the spring, which are not shown in the proof. It is not shown where the boundary line of the incorporation, if any, is located. with reference to the spring, the place of the accident.

It was held in *Railroad v. Collier*, 104 Tenn., 189, 54 S. W., 980, that the statute under consideration "relates alone to incorporated municipalities," reaffirming *Webb v. Railroad Co.*, 88 Tenn., 119, 12 S. W., 428.

It is said, however, that the court will take judicial notice of the fact that Rogersville is incorporated, and *State v. Murfreesboro*, 11 Humph., 217; *Coal Creek Co. v. East Tenn. Co.*, 105 Tenn., 563, 59 S. W., 634; *Frazier v. Railroad Co.*, 4 Pick. (88 Tenn.), 138, 12 S. W., 537—are cited in support of the contention. These cases establish the proposition that the court will take judicial knowledge of the fact of incorporation, where such fact is evidenced by an act of the legislature duly published, which, of course, the court judicially knows. But the fact of incorporation is not a material inquiry in this case. The location of the boundaries of the corporation is the

material matter here, and this court will not know judicially. It is essential, as a part of the plaintiff's case, that proof be offered to show that the defendant failed to comply with the statute by sounding the whistle or ringing the bell one mile from the boundary of the incorporated town. This holding harmonizes the cases above cited and meets the legislative intent in enacting subsection 3 of section 1574 of Thompson's-Shannon's Code.

There being no proof of the location of the boundary line of the municipality of Rogersville, with reference to the scene of the accident, the proof in the case of the failure of the defendant to sound the whistle and ring the bell, has no application, and cannot aid him any.

The other questions discussed by counsel, while interesting and ably presented, do not arise upon the record. The special requests forming the basis of assignment of error in this court were properly declined by the trial judge because they do not embrace an accurate statement of the law. Affirmed.

EDGAR R. ALLEN *et al.* v. G. S. HAYS *et al.**

(Knoxville. September Term, 1917.)

1. BILLS AND NOTES. Presumptions. Ownership of note.

The possession by a third party of a note payable to the order of the payee and not indorsed by him raises no presumption of ownership, and no such presumption is created by Negotiable Instrument Law, section 49 (Thompson's Shannon's Code, section 3516a48), providing that a transfer for value without indorsement vests in the transferee such title as the transferor had, and that the transferee acquires in addition the right to the transferor's indorsement, as this contemplates the making of proof of the transfer. (*Post*, pp. 58-61.)

Cases cited and approved: *Swanby v. Northern State Bank*, 150 Wis., 572; *Kiefer v. Tolbert*, 128 Minn., 519; *Tuttle v. Becker*, 47 Iowa, 486; *Robertson v. Dunn*, 87 N. C., 191; *Vastine v. Wilding*, 45 Mo., 89; *Bausman v. Kelley*, 38 Minn., 197.

Cases cited and distinguished: *Roy v. Duff*, 170 Iowa, 319; *Gano v. McCarthy*, 79 Ky., 409.

Code cited and construed: Sec. 3516a48 (T.-S.).

2. GIFTS. Presumptions. Sufficiency of evidence. Gift of note.

Where proceeds of notes were found on the death of the payee in the hands of one named as executor, and the notes were not indorsed by the payee when collected, the presumption is that they were his property, and a son of the executor, claiming ownership under an alleged gift to the executor for his benefit, has the burden of proof to overcome such presumption by proof that is clear and satisfactory upon every point essential to title by gift. (*Post*, pp. 61, 62.)

Case cited and approved: *Reading Trust Co. v. Thompson*, 254 Pa., 333.

*As to effect of production of bill or note not transferable by delivery, to establish prima facie plaintiff's title to note, especially as to presumption between payee and stranger in possession see note in 50 L. R. A. (N. S.), 588.

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FROM GREENE.

Appeal from Chancery Court of Greene County.—
HUGH G. KYLE, Chancellor.

EPPS & YOUNG and W. H. PIPER, for appellant.

SHOUN & TRIM and SUSONG & BIDDLE, for appellees.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

This is a controversy involving the distribution of the estate of Dr. M. F. Jeralds, a leading physician of Greene county, who died in January, 1913. There were two executors of his estate. One of these, Allen, filed the bill of complaint against the other, Dr. G. S. Hays, and other defendants, for the purpose, among others of calling Hays to account for the amount of certain notes executed by one C. A. Johnson to Jeralds and secured by a mortgage on real estate.

The defendant executor defends on the ground that, though he had collected the notes, that fact preceded the death of Jeralds, and that the latter had long prior to the date of collection given the notes to him, G. S. Hays, to be held as a gift to Gerald Hays, the son of Hays, who married a daughter of testator.

The money, along with other funds belonging to Hays personally, was lent by Hays to one Shanks;

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the sum *in solido* being represented in a note payable to Hays himself, without any definition in the note or in the mortgage securing it of any trust, as to any portion of it in favor of the boy, Gerald.

The complainant executor's theory is that the fund collected by Hays came into the hands of the latter as a personal representative of Jeralds and should be accounted for accordingly.

This opinion concerns the question whether or not a parol gift of the Johnson mortgage notes by the grandfather to defendant Gerald Hays is established.

The proposition advanced by counsel of Hays and Gerald Hays is that the possession of the notes raises a presumption of title, and that proof of possession along with testimony showing that Hays asserted at various times that the possession held by him was for his son, in explanation thereof, made a sufficient case, at least *prima facie*, to entitle the possession to be maintained until the contrary is established.

It becomes material, therefore, to inquire whether, since the notes which were payable to order, but not indorsed by Jeralds, the payee, such a presumption of ownership arises from possession.

The defendant seeks to buttress the claim to a presumption of title, arising from possession of the notes by referring to section 49 of the Negotiable Instrument Law (Thompson's Shannon's Code, section 3516a48), which is as follows:

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“Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferer had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferer. But, for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.”

But this section clearly contemplates the making of proof of a transfer. *Swanby v. Northern State Bank*, 150 Wis., 572, 137 N. W., 763; *Kiefer v. Tolbert*, 128 Minn., 519, 151 N. W., 529; Crawford, Neg. Ins. Law (4 Ed.), section 49, p. 91.

Further, such transfer must be one for value; and it is not claimed that value supported the claim gift of the notes in question.

The above-quoted section does not have any bearing upon the matter of presumption. We need not determine whether, under the rule of construction *expressio unius*, section 16 of the act (Thompson's Shannon's Code, section 3516a15), which does deal with the matter of presumptions, shows that no such presumption obtains, in this phrase:

“When the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved.”

Pretermitted that question, is there such a presumption at common law against the payee?

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In *Roy v. Duff*, 170 Iowa, 319, 152 N. W., 606, which arose after the passage of the Uniform Act in that State, it was said respecting the presumption existing against the payee of such a note:

“This title is presumed to continue until it is shown to have been divested, and we take it to be the rule that the mere possession of such paper, without indorsement, where there is no evidence of a consideration paid, and no evidence of delivery except possession, is an insufficient showing of the passing of title of the defendant. . . . The mere possession of a negotiable promissory note or any negotiable instrument, the title to which passes under the law merchant by indorsement and delivery, is not *prima-facie* evidence of ownership as against the payee. The absence of the indicia of ownership is wanting, and mere possession does not supply this.”

In an earlier case, *Tuttle v. Becker*, 47 Iowa, 486, it was said that, if possession is *prima-facie* evidence of ownership, then the thief or wrongdoer would have the owner at a serious disadvantage.

Gano v. McCarthy, 79 Ky., 409, was a contest between one claiming a note under voluntary gift alleged to have been made by the deceased payee and the latter's administrator. There was no indorsement of the note, but it was in the claimant's possession. The court said:

“The mere fact of possession upon such a state of facts, was not *prima-facie* evidence of ownership. There might have been such a gift of the note, or a

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verbal sale of it, by the intestate to his niece, as to prevent a recovery by his personal representative, is not doubted; but such a defense must be sustained by the proof, and the law will not presume the existence of such facts from the mere possession of the note by the claimant as will deprive the owner of title. The presumption is that the title and right of possession is with the original owner, and the burden is on the claimant to show that his possession is rightful. . . . It would be an easy matter to deprive the owner of his property, if in such a case he were required not only to make his action good by showing title in himself, but, must, in some other manner than the exhibition of his title, negative the idea that the possession of the defendant is wrongful."

See, also, *Robertson v. Dunn*, 87 N. C., 191; *Vastine v. Wilding*, 45 Mo., 89, 100 Am. Dec., 347; *Bausman v. Kelley*, 38 Minn., 197, 36 N. W. 333, 8 Am. St. Rep., 661.

The case in hand is yet stronger against the presumption. The notes' proceeds were found at the death of Jeralds in the hands of Hays as one of his executors, we think must be the legal effect of the transactions, nothing else appearing. The presumption in such case is that the notes, unindorsed when collected, were yet the property of the payee. See note, 50 L. R. A. (N. S.), 588.

Where, therefore, as here, the claim of the alleged donee, the child of the defendant executor, may arise out of the fact that his father had opportunities as

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personal representative to come into possession of the notes and their proceeds, not only is the burden of proof on the claimant but he must overcome that presumption by proof clear and satisfactory upon every point essential to title by gift. *Reading Trust Co. v. Thompson*, 254 Pa., 333, 98 Atl., 953.

Without meaning to impute wrong to the defendant executor, or to intimate that the record indicates any degree of unfaithfulness to his trust, we hold, as did the chancellor, that the competent proof fails to show that the notes passed as a gift *inter vivos* to Gerald Hays.

The chancellor's decree on this and the other matters in contest being correct, it is affirmed. Costs of the appeal will be paid, one-third by defendants and two-thirds by complainant.

CASEY-HEDGES Co v. SOUTHWESTERN SURETY Co.

(Knoxville. September Term, 1917.)

1. INSURANCE. Liability insurance. Extent of insurer's liability.
"At its own expense."

Under a policy insuring against loss from claims for personal injuries, limiting the insurer's liability on account of one accident to \$5,000, and reserving to the insurer the right to assume the management and defense of suits for such injuries, and providing that when it assumed such defense it would defend at its own expense, the moneys expended in such defense not to be included in the limit of liability previously fixed, the insurer was liable for taxable costs in addition to the \$5,000; such costs being a part of the costs of defense, and the expression "at its own expense" meaning practically the same as "at the cost" of the insurer. (*Post*, p. 67.)

Cases cited and approved: *Nat. Provident Worsted Mills v. Frankfort, etc., Ins. Co.*, 28 R. I., 126; *Munro v. Maryland Cas. Co.*, 48 Misc. Rep., 183; *Aetna L. Ins. Co. v. Bowling Green Gaslight Co.*, 150 Ky., 732.

2. INSURANCE. Liability insurance. Extent of liability. "Moneys expended in defense."

Under such policy, where an appeal was taken from a judgment recovered against insured on the claim for personal injuries, the insurer was liable for the interest accruing on the portion of the judgment for which it was liable; such interest coming within the term "moneys expended in said defense," which by the policy were to be excluded from the limitation of liability. (*Post*, pp. 67-72.)

Cases cited and approved: *Davison v. Maryland Cas. Co.*, 197 Mass., 167; *Munro v. Maryland Cas. Co.*, 48 Misc. Rep., 183; *Coast Lumber Co. v. Aetna Life Ins. Co.*, 22 Idaho, 264; *New*

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Amsterdam Cas. Co. v. Cumberland Tel. & Tel. Co., 152 Fed., 961;
Saratoga Trap Rock Co. v. Standard Acc. Ins. Co., 143 App.
Div., 852.

FROM HAMILTON.

Appeal from the Chancery Court of Hamilton County.—W. B. GARVIN, Chancellor.

SIZER, CHAMBLISS & CHAMBLISS, for appellants.

MARTAIN & TRIMBLE, for appellee.

MR. JUSTICE GREEN delivered the opinion of the Court.

This suit was brought to recover a balance alleged to be due complainant on an employer's liability policy. There was a decree for the complainant below, from which defendant has appealed.

The complainant is a manufacturer in Chattanooga, and in 1912 obtained a liability policy from the defendant covering accidents to complainant's employees, which policy will be more particularly referred to later.

One J. R. Oliphant, an employee of the complainant, sustained certain injuries in the course of his work alleged to have been due to complainant's negligence, and brought suit for \$25,000 damages in the district court of the United States. Notice of this suit was given to defendant surety company, and the

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defense thereof was conducted jointly by the complainant and the surety company. There was a judgment in the district court for \$6,000. A writ of error was sued out in the name of the complainant, and the case carried to the circuit court of appeals, where the judgment of the trial court was affirmed. 228 Fed., 636, 143 C. C. A., 158.

An effort was made to obtain a review of the case on *certiorari*, which was denied by the supreme court of the United States. Meanwhile an execution issued and was levied on property of the complainant to satisfy the judgment in favor of Oliphant and his costs and interest on said judgment pending the disposition of the writ of error by the circuit court of appeals. This execution was paid off by the complainant.

The surety company paid to the Casey-Hedges Company the sum of \$5,000, but denied liability for any part of Oliphant's costs recovered, and for any part of the interest which had accrued on the judgment of the district court.

This bill was filed to recover the amount of Oliphant's costs and interest on \$5,000 of the judgment.

The policy issued by the defendant surety company insured the complainant herein against "loss and expense arising from claims upon the assured for damages on account of bodily injuries accidentally suffered or alleged to have been suffered during the period of this policy by any employee of the assured by reason of the prosecution of the work described herein."

Another provision of the policy is as follows: "The company's liability on account of an accident to one person is limited to \$5,000."

There is a provision with respect to notice of accidents, and then appear these clauses:

"If a claim is made on account of an accident, the assured shall give like notice thereof; and the company at its own expense will settle or contest the same."

"If a suit is brought on account of an accident, the assured shall forward immediately to the company or to its duly authorized agent every process and paper served on him. The company at its own expense will settle or defend said suit, whether groundless or not; the moneys expended in said defense shall not be included in the limitation of the liability fixed under this policy. The assured shall not assume any liability nor interfere with any negotiations for settlement or any legal proceeding, nor incur any expense, nor settle any claim except at his own cost without written consent of the company."

The contention of the defendant is that the extent of its liability, according to the terms of this policy, is \$5,000, which sum it has paid, and that it cannot be held for anything else except "moneys expended in said defense." It is insisted that the costs and interest herein sued for are not included in the phrase, "moneys expended in said defense," and are not a part of the expense of defending the suit.

Most of the liability policies which have come under our notice provide for the defense of suits against the assured "at the cost" of the liability company. In this policy the insurer reserves the right to defend such suits "at its own expense."

There is some effort on the part of counsel to distinguish between the meaning of these two phrases. We are not able to take such distinction. The phrases are practically equivalent.

It has been held in a few cases that this undertaking to defend at its own cost did not bind the insurer for the taxable costs of the case, but that the language referred merely to such costs as attorney's fees, stenographer's charges, and the like. *National Provident Worsted Mills v. Frankfort, etc., Ins. Co.*, 28 R. I., 126, 66 Atl., 58; *Munro v. Maryland Cas. Co.*, 48 Misc. Rep., 183, 96 N. Y. Supp., 705.

We think the weight of authority is now to the contrary. See cases collected in note to *Aetna L. Ins. Co. v. Bowling Green Gaslight Co.*, 150 Ky., 732, 150 S. W., 994, as reported in 43 L. R. A. (N. S.), 1128. An undertaking therefore on the part of a liability company to defend a suit at its own cost or at its own expense binds such company for the payment of court costs, even though such costs exceed the maximum liability of the company for damages on account of an accident. Such costs are part of the cost of defense.

This proposition is not very seriously controverted by the defendant in this case. The principal con-

troversy is with reference to the defendant's liability for any part of the interest which accrued on the judgment of the district court.

It may be conceded that the greater number of adjudicated cases construing policies such as the one under consideration hold that interest on a judgment accruing during the time that an appeal therefrom is pending is not a part of the costs and expenses of the litigation in such a sense that it may be allowed in excess of the stipulated indemnity. *Davison v. Maryland Cas. Co.*, 197 Mass., 167, 83 N. E., 407; *Munro v. Maryland Cas. Co.*, supra; *National, etc., Worsted Mills v. Frankfort, etc., Ins. Co.*, supra; *Coast Lumber Co. v. Aetna Life Ins. Co.*, 22 Idaho, 264, 125 Pac. 185, and other cases collected in notes Ann. Cas., 1914D, 1067, and 43 L. R. A. (N. S.), 1128.

The question is undecided in this State and with due deference we think that the view announced in the cases just cited is too narrow, and we are not inclined to follow these authorities.

Under the stipulations of the policy the insured has no control of the course of the litigation after the liability company undertakes the defense. Any interference on the part of the assured may forfeit his rights under the policy. He has no voice whatever in determining the propriety of an appeal. It would seem, therefore, that interest accruing during an appeal on so much of a judgment as the insurer was liable for should be borne by the insurer. To that

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extent the appeal is prosecuted for the benefit of the insurer.

It is said, however, that the whole matter rests in the domain of contract, and that it is competent for the parties to agree that the liability of the insurer shall be so much and no more. This is undoubtedly true, and the question should be determined on the contract made between the parties.

In the contract before us the insurance company undertook to respond to the extent of \$5,000 for damages sustained by the assured on account of bodily injuries suffered by the insured's employee. The insurer also reserved the right to assume the management and defense of any suits brought to recover such damages against the insured, and, when it assumed the defense, undertook to defend at its own expense—the moneys expended in such defense not to be included in the limit of liability previously fixed.

The insurer not only agreed to reimburse the insured to the extent of \$5,000 for loss sustained for damage claims, but also stipulated that it would conduct any suit, the defense of which it undertook, at its own expense.

The expense of the latter undertaking, therefore, is expressly excluded from the limitation of liability for damages on account of the accident.

Is the interest on that part of a judgment for which the insurer is ultimately liable, accruing during the prosecution of an appeal, taken at the instance of the

insurer, a part of the expense of the litigation or of the defense?

We think it is. The interest on a judgment during such period is fixed by law. It applies to every case and is taxed on every judgment which is not reversed in the appellate courts. It is incident to every appeal and part of the expense of every unsuccessful appeal. The prosecution of an appeal or a writ of error is a part of the defense, and expense so incurred is an expense of the defense. We can see no reason for excluding such an item from the obligation of the policy to reimburse the assured for "moneys expended in said defense."

Such interest is commonly taken into consideration by counsel along with costs in advising about the propriety of appellate proceedings, and is reckoned as a possible expense of litigation.

This is the result reached by the Kentucky Court of Appeals in *Aetna Life Ins. Co. v. Bowling Green Gaslight Co.*, supra. Such also appears to be the opinion of the circuit court of appeals for the sixth circuit in *New Amsterdam Cas. Co. v. Cumberland Telephone & Telegraph Co.*, 152 Fed., 961, 82 C. C. A., 315, 12 L. R. A. (N. S.), 478. See, also, the dissenting opinion in *Saratoga Trap Rock Co. v. Standard Acc. Ins. Co.*, 143 App. Div., 852, 128 N. Y. Supp., 822.

Responding to one of the arguments advanced by the courts disallowing a recovery of interest under such circumstances, the Kentucky court said:

“An attempt, however, is made to distinguish between the items of damage and cost and the items of interest, and the argument is made that as the assured had the use of the \$5,000 during the appeal, and as this use was worth the interest, therefore, this should not be accounted an expense, as the assured did not lose anything by paying the interest. But this argument overlooks the fact that the assured had to pay to the claimant the interest it now demands, and unless it recovers it from the insurance company, it will be out this item of expense incurred by the litigation. If the insurance company had paid the \$5,000 when the judgment was rendered in the lower court, at which time the claimant first became entitled to interest, that would have ended its liability under the policy. But this it refused to do, and now, unless it pays the interest that accrued on this \$5,000 after that time and pending the appeal, the assured will lose it. The fact that the assured had the use of the \$5,000 pending the appeal has nothing to do with who shall pay this interest, but if it did, the parties would be on an equal footing, because the insurance company also had the use of the \$5,000 during the appeal. It is simply a question of which one should bear this item of expense, and we think the insurance company should.”

In the case before us the writ of error seems to have been sued out with the consent of the insured. Both the insurer and insured joined in the prosecution of this writ of error in the circuit court of ap-

peals. The judgment affirmed was for \$6,000. The insurer was liable for \$5,000, or five-sixths of this judgment. The insurer is here seeking a recovery of five-sixths of the interest accrued and paid by it.

The chancellor pronounced a decree in favor of the complainant for the costs and five-sixths of the accrued interest paid by it, and this decree will be affirmed.

STATE *ex rel.* B. D. JONES *et al.* v. JOE J. HOWARD.

(*Knoxville*. September Term, 1917.)

1. **CERTIORARI.** Moot case. Costs. Merits.

On *certiorari* bringing up question of eligibility of officer to hold office, the supreme court will consider the case, though term of office has expired where matter of costs remains to be adjudicated and this depends on the merits. (*Post*, p. 75.)

2. **JUDGES.** County court. Chairman. Qualifications.

Under Constitution, article 6, section 1, vesting the judicial power of the State in the supreme court and other courts, and "in justices of the peace," Thompson's Shannon's Code, section 221, providing that a court to be called the county court is established in each county, composed of the magistrates, section 5992, providing that the county court consists of the justices of the county, and section 493, providing that every county is a corporation, and the justices of the county court are the representatives of the county, no one is eligible for the office of chairman of the county court who is not a justice of the peace of the county. (*Post*, pp. 75-77.)

Acts cited and construed: Acts 1835-36, ch. 6; Acts 1794, ch. 1, sec. 44; Acts 1835, ch. 6, sec. 1; Acts 1838, ch. 135; Acts 1875, ch. 70.

Codes cited and construed: Secs. 127, 4179, 4180, 4186 (1858); Sec. 5992 (T.S.).

3. **STATUTES.** Construction.

Courts have no right to give to statutes a meaning not deducible from the unambiguous language used. (*Post*, pp. 77, 78.)

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Cases cited and approved: Redistricting Cases, 111 Tenn., 277-281; Ledgerwood v. Pitts, 122 Tenn., 606; Johnson v. Brice, 112 Tenn., 07; State v. Leonard, 86 Tenn., 185; State ex rel. v. Maloney, 92 Tenn., 62; State v. McKee, 76 Tenn., 24; State ex rel. v. Glenn, 54 Tenn., 472; Murray v. State ex rel., 115 Tenn., 303.

Codes cited and construed: Sec. 6006 (S.); Sec. 6027 (T.-S.).

FROM MONROE.

Appeal from the Chancery Court of Monroe County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.
—FOSS H. MERCER, Chancellor.

McCROSKEY & PEACE, for appellants.

LINDSAY, YOUNG & DONALDSON and M. F. VALENTINE, for appellee.

MR. JUSTICE FENTRESS delivered the opinion of the Court.

This is a *quo warranto* proceeding, instituted by the district attorney-general, in the name of the State, upon the relation of B. D. Jones and other citizens and taxpayers of Monroe county, against the defendant, Howard. The bill alleged that Howard had been elected chairman of the county court of that county for the year 1915, and that he was not eli-

gible for the office because he was not a justice of the peace, and furthermore that he had been guilty of mal-administration of its duties, and should also, on that account, be removed.

Defendant demurred to so much of the bill as alleged that he was ineligible to fill the office. The chancellor sustained the demurrer, and upon the final hearing dismissed the bill, and the relators appealed to the court of civil appeals. That court reversed the decree of the chancellor, upon the ground that defendant was not qualified to hold the office, and entered a decree directing that he be removed.

The defendant filed his petition here for *certiorari*, and insists that he was not disqualified to hold the office because he was not a magistrate. The writ was granted *pro forma* by this court.

While the term of office which the defendant was filling has long since expired, nevertheless the matter of costs remains to be adjudicated, and this depends upon the merits of the case.

We are of the opinion that no one is eligible for the office of chairman of the county court except a justice of the peace of the county.

After the adoption of the Constitution of 1834 there was passed by the General Assembly "An act to reorganize the county courts in this State." Acts 1835-36, chapter 6. Section 1 of this act provides: "That hereafter there shall be established a court in each and every county in this State, to be

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held by the justices of the peace thereof . . . to be called the county court."

The substance of this section of the above act appears in Code 1858, section 127, as follows:

"A court is established in each county of this State, composed of the magistrates . . . for the despatch of probate and other business intrusted to it, to be called the county court." Thompson's-Shannon's Code, section 221.

By section 5992, Thompson's-Shannon's Code, it is provided: "The county court consists of the justices of the county. It is divided into a quarterly and monthly court, the first being held by all or such number of the justices necessary to transact business, the latter by the chairman or judge of the county court. No discontinuance of process, or any matter or thing depending in said court, shall be produced by a failure to hold court at any regular session."

This provision of the Code is based upon Acts 1794 (N. C.) chapter 1, section 44; Acts 1835, chapter 6, section 1; Acts 1838, chapter 135; Acts 1875, chapter 70; also Code 1858, sections 4179, 4180, 4186.

It is also provided by Thompson's-Shannon's Code, section 493, as follows:

"Every county is a corporation, and the justices in the county court assembled are the representatives of the county, and authorized to act for it."

This provision is taken from section 402 of the Code of 1858.

Thus it is repeatedly declared that the county court is composed of the justices, and that they are authorized to act for the county. The statutes do not mention other persons, and the courts have no right to give to the statutes a meaning not deducible from the unambiguous language used. So it is we are of the opinion that no one except a justice of the county has the right to participate in any of the functions of that court. Of course, we are not to be understood as holding that a county judge may not be lawfully appointed by the Governor, or elected by the people, under statutory authority, although such judge is not a justice of the peace. The contrary has been frequently held. *Redistricting Cases*, 111 Tenn., pp. 277-281, 80 S. W., 750, and authorities cited.

We could rest the decision of this case upon the above statutes; however, no one has the authority to act as chairman of the county court, except a justice of the peace, for the reason that by the Constitution (article 6, section 1) it is provided:

“The judicial power of this State shall be vested in one supreme court, and in such circuit, chancery and other inferior courts as the legislature shall from time to time, ordain and establish; in the judges thereof, and in justices of the peace. The legislature may also vest such jurisdiction in corporation courts as may be deemed necessary. Courts to be holden by justices of the peace may also be established.”

It has been repeatedly held by this court that the chairman or judge of the county court is a judicial

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officer. *Ledgerwood v. Pitts*, 122 Tenn., 606, 125 S. W., 1036; *Johnson v. Brice*, 112 Tenn., 67, 83 S. W., 791; *State v. Leonard*, 86 Tenn., 485, 7 S. W., 453; *State ex rel. v. Maloney*, 92 Tenn., 62, 20 S. W., 419; *State v. McKee*, 8 Lea, 24; *State ex rel. v. Glenn*, 7 Heisk., 472. The law has imposed upon him the duties of the quorum court. By Shannon's Code, section 6006, it is provided:

"The chairman of the county court shall attend at the courthouse of his county on the first Monday of every month, and shall exercise all jurisdiction heretofore exercised by the quorum courts; and shall, on said first Mondays and such subsequent days as may be necessary, attend to all matters and adjudicate and determine all questions and do all other acts and things the quorum courts could do."

The powers of that court are defined by Thompson's-Shannon's Code, section 6027 et seq., and are paraphrased in the opinion of this court in *Johnson v. Brice*, 112 Tenn., 67, 83 S. W., 791.

It will be observed that these duties are entirely of a judicial character, and it has been so held by this court. *Johnson v. Brice*, 112 Tenn., 59, 83 S. W., 791; *Murray v. State ex rel.*, 115 Tenn., 303, 89 S. W., 101, 5 Ann Cas., 687.

Thus it is seen that both under the Constitution and under the statute law of the State the defendant is not eligible for the office of chairman of the county court, and therefore the decree of the court of civil appeals is affirmed.

C. CROSS v. BUSKIRK-RUTLEDGE LUMBER CO.*(Knoxville. September Term, 1917.)***1. VENDOR AND PURCHASER. Contract for warranty deed. When contract becomes executed. Remedies of vendee.**

Where title is defective, delivery of a warranty deed to one who has gone into possession on representation of good title under contract of bargain and sale, but providing for "apt and proper deed with covenants of general warranty," does not render the contract an executed one, so as to prevent a rescission of the contract, in the absence of waiver. (*Post*, pp. 85-92.)

Cases cited and approved: *Topp v. White*, 59 Tenn., 165; *McElya v. Hill*, 105 Tenn., 319; *Land Co. v. Hill*, 87 Tenn., 588; *Buchanan v. Alwell*, 27 Tenn., 516; *Cunningham v. Sharp*, 30 Tenn., 116; *Hale v. Sharp*, 44 Tenn., 275; *Hardwick v. American Can Co.*, 113 Tenn., 657.

2. WILLS. Construction.

A gift by testator of the use of all his property, real and personal, to his wife for her life, created a life estate in all property, real and personal. (*Post*, pp. 92, 93.)

Cases cited and approved: *Gourley v. Thompson*, 34 Tenn., 387; *McKee v. McKee*, 52 S. W., 320; *Matthews v. Capshaw*, 109 Tenn., 480.

3. WILLS. Construction. Contradiction.

Where a testator gave wife a life estate in all his property, a power of sale given to executors cannot be construed to deprive her of her life estate, or dispose of property without her joining in the deed. (*Post*, pp. 93-95.)

Cases cited and approved: *Allen v. Susong*, 41 Tenn., 204; *Davidson v. Phillips*, 17 Tenn., 93; *Greer v. Wroe*, 33 Tenn., 246; *Hubbard v. Godfrey*, 100 Tenn., 150; *Pullen v. Hopkins*, 69 Tenn., 741; *Hicks v. Fredericks*, 77 Tenn., 491.

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4. VENDOR AND PURCHASER. Contract for warranty deed. When executed.

Under contract for warranty deed, delivery of warranty deed, where title of grantor depends on parol evidence of adverse possession, is not sufficient to render contract executed, in absence of waiver, because title must be good as founded on the records, and not on fact not of record. (*Post*, p. 95.)

5. SPECIFIC PERFORMANCE. Contracts for sale of land.

Although grantor has good title by reason of adverse possession, a contract of sale of such land cannot be specifically enforced unless good title is shown of record, because a purchaser does not have to take a title which will have to be proved by parol evidence. (*Post*, pp. 95-97.)

Cases cited and approved: *Mullins v. Aiken*, 49 Tenn., 535; *Cunningham v. Sharp*, 30 Tenn., 116; *Topp v. White*, 59 Tenn., 165; *Buchanan v. Alwell*, 27 Tenn., 516; *Collins v. Smith*, 38 Tenn., 255.

FROM SCOTT.

Appeal from the Chancery Court of Scott County.—HUGH G. KYLE Chancellor.

E. G. FOSTER and H. M. CARR, for appellant.

J. F. BAKER and J. A. FOWLER, for appellee.

MR. JUSTICE GREEN delivered the opinion of the Court.

This bill was filed by the complainant to collect a balance alleged to be due from the defendant on account of the purchase of a tract of land in Scott county. The bill averred that the contract had been exe-

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cuted and a deed for the land delivered. The complainant prayed for alternative relief in the event he had mistaken his remedy. He asks in this court that he be granted a decree for specific performance if the court should not agree with him that this contract had been executed.

The defendant filed an answer, denying that a completed or executed contract of sale of the land in question had been made. Defendant insisted that there was only an executory agreement to purchase, with which it had refused to comply on account of complainant's defective title. Defendant also filed a cross-bill in which it asked for a rescission of the contract made with the complainant, and for a recovery of that part of the purchase money which had been paid to the complainant, and also for damages.

A great mass of proof was taken, and the chancellor decreed that the contract between the parties had not been executed, and furthermore decreed that complainant's title to the land was defective, and refused a specific performance, and dismissed complainant's bill. It appeared that defendant had already cut certain timber on the lands in question, and the chancellor ordered a reference to ascertain the value of this timber, and also directed the master to report what damages the defendant had sustained. Before this account was taken, an appeal was prayed and granted, and the case has been heard in this court.

The complainant, C. Cross, Edward L. Hall, and Edward Shaver were owners of a tract of land in

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Scott county, Tenn., which they acquired by deed from W. H. Buttram, clerk and master, November 27, 1899. These parties also had other assurances of title. The tract of land consisted of about 1,800 acres.

U. B. Buskirk was a lumber man residing in Lexington, Ky. He came to Scott county, Tenn., in February, 1913, looking for timber lands. While there he met the complainant, Cross, and the latter showed Buskirk this tract of land owned by Cross, Hall, and Shaver. Negotiations followed between Cross and Buskirk, and on March 10, 1913, Cross, for himself and associates, and Buskirk, for the J. W. Johnson Company, the predecessor of the Buskirk-Rutledge Lumber Company, entered into the following written agreement:

“This agreement, made and entered into this the 10th day of March, 1913, by and between C. Cross of Oneida, Tenn., and Edward L. Hall of Jamestown, N. Y., as parties of the first part, and J. W. Johnson Co., a corporation of Lexington, Ky., as party of the second part.

“Whereas, the parties of the first part are joint owners in a certain boundary of land aggregating about eighteen hundred acres, situated in Scott county, Tenn., near the town of Oneida, in district No. 8. Said land is further described as being known as the Blankenship land, whereas C. Cross, one of the parties to this agreement, is owner in his own right of three tracts of land, two of which adjoin the eighteen

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hundred acres first above referred to, the other tract lying partly in the town of Oneida, Tenn., known as the Joshua Smith tract:

“Now this agreement witnesseth: That the said C. Cross and Edward L. Hall have this day bargained and sold to the party of the second part the eighteen hundred . . . of land referred to in this contract at the price of eight dollars (\$8) per acre, on the following terms and condition: That is to say, one-third cash, one-third in six months, one-third in twelve months, deferred payments to draw interest from date of deed.

“The said C. Cross and Edward L. Hall agree to survey the said land as quickly as can reasonably be done, and when acreage is ascertained by survey, then the said C. Cross and Edward L. Hall are to make to the second party an apt and proper deed with covenants of general warranty, retaining a vendor's equitable lien upon the land to secure the unpaid purchase money.

“The said C. Cross and Edward L. Hall acknowledge the receipt of five thousand dollars, evidenced by the said second party's check on the Phoenix 3rd National of Lexington, Ky., payable to C. Cross.

“Upon ascertaining the true acreage of the said land by survey, should it turn out that the five thousand dollars so paid is not sufficient to cover one-third of the purchase money, then the said second party is to immediately pay the said C. Cross and Edward

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L. Hall a sum equal to the difference of the one-third and the five thousand dollars so paid.

“However, should it turn out that five thousand dollars so paid is in excess of the one-third of the purchase price, then the said C. Cross and Edward Hall are to refund the difference to the said second party.

“C. Cross, in his own right, gives the said second party the privilege of taking the other three tracts at the same price and upon the same terms and conditions as the eighteen hundred acre tract.

“Witness our hand and seal day and date above written.

“C. CROSS. [Seal.]

“EDWARD L. HALL, [Seal,]

“By C. CROSS.

“J. W. JOHNSON COMPANY, [Seal,]

“By. U. B. Buskirk, V. P.

“Witness: H. R. ANDERSON.”

At the time of this purchase, Buskirk's company was anxious to procure lumber to fill certain contracts that it had outstanding. A survey of the land described was begun promptly. One surveyor was employed by Cross and another by Buskirk.

Before any deed to the land was drawn up, Buskirk's people entered and began cutting the timber. Cross believed that he had a perfect title, and so assured Buskirk, and Buskirk thereupon entered and began cutting, on the faith of this assurance.

On March 12, 1913, a deed to the land, describing it in two tracts, was drawn up and executed by Cross and wife to Buskirk's company. This deed was left with Mr. Baker, defendant's attorney. Cross had previously taken deeds to himself from Edward L. Hall, one of his associates, and from the executors of Edward Shaver, his other associate in the ownership of this land, Shaver having died.

This deed did not accurately recite the consideration paid for the land. An additional memorandum or agreement was drawn up and executed by Cross, which fully recited the consideration paid. This it appears was done by the parties to beguile the tax assessor.

In pursuance of the terms of the contract of sale, Buskirk paid to Cross \$5,000, and later paid him \$468.69, which was one-third of the purchase price agreed on after the acreage was determined.

Some other agreements and writings were executed and correspondence had between the parties, which it is not material to set out in this connection.

One of the principal controversies between the parties, as indicated in the statement above, is whether or not this contract between them was executed or executory.

The complainant insists that the transaction was closed and title passed as a result of the contract of March 10, 1913, heretofore copied. We do not assent to this contention. It is true that the agreement recited that the vendors had "bargained and sold,"

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using the past tense, but a further inspection of the document discloses that other things were to be done. The land was to be surveyed, and upon the acreage ascertained the amount of the cash payment was to be estimated, and turned over, and "an apt and proper deed with covenants of general warranty" was to be made by the vendors. The deal was not completed, and the contract was not executed at this stage. *Topp v. White*, 59 Tenn. (12 Heisk.), 165.

Complainant next insists that the contract certainly became executed when the deed was prepared and delivered to Mr. Baker, defendant's attorney.

Over this latter contention perhaps the greatest fight in the case is made.

Mr. Cross insists that it was understood between him and Buskirk that the transaction was to be closed by the delivery of this deed to Mr. Baker. Mr. Foster partially corroborates this contention.

Mr. Buskirk, on the contrary, maintains that it was understood between the parties that this deed was to be turned over to Mr. Baker along with the complainant's other title papers, to enable Mr. Baker to pass on the title to the lands, and that the understanding was that the transaction should not be considered as closed until title to the lands had been examined and approved by Mr. Baker.

On the theory that this contract has been executed, the complainant insists that defendant may not avoid payment of the purchase price or have a rescission, even though the title to the land partially

fails. Complainant insists that under such circumstances defendant's only remedy is upon the covenants in the deed executed by the vendors.

Before considering this, it should be pointed out that defendant did not enter upon this land under the deed. For reasons stated above, defendant entered upon the land shortly after the contract of sale was made, upon complainant's assurance of good title and before the deed was executed. There can be no controversy as to this on the proof in the record.

The general rule undoubtedly is that a vendor's remedy for a defective or incumbered title, in the absence of fraud or insolvency of the vendor, is not rescission, but an action upon the covenants of his deed, where the contract is an executed one. *McElya v. Hill*, 105 Tenn., 319, 59 S. W., 1025; *Land Co. v. Hill*, 87 Tenn., 588, 11 S. W., 797; *Topp v. White*, 59 Tenn. (12 Heisk.), 165; *Buchanan v. Alwell*, 27 Tenn. (8 Humph.), 516.

This rule, however, is said not to "apply in any jurisdiction where there is a provision to the contrary in the contract." 39 Cyc., 1445.

"Particular provisions are frequently found in contracts which specifically or by implication require the vendor's title to be good. Thus it has been held that the conveyance of a good title by the vendor is required where a contract for the sale of land provides for a 'good and sufficient title,' a 'lawful title,' a 'perfect title,' a 'general warranty of title,' a

'good' or 'good and valid' deed, a 'good and sufficient deed to vest the title,' or 'to convey the title,' a 'good and lawful deed and title,' a 'deed or conveyance clear of all incumbrances,' a 'deed with a covenant against incumbrances, a deed or conveyance 'free and clear,' a 'deed conveying a clear title,' a 'deed in fee,' a 'good and perfect deed,' a 'good and sufficient deed,' or 'good and sufficient conveyance,' a 'lawful deed of conveyance,' a 'deed' or 'deed of conveyance,' a proper conveyance for the conveying and assuring the fee simple of the premises,' a 'good and valid deed,' with the usual covenants of 'seisin and warranty,' a 'good and sufficient warranty deed, in fee simple, free from all incumbrances,' a 'warranty deed,' a 'general warranty deed,' or a 'good and sufficient warranty deed.' " 39 Cyc., 1445.

We have two instances of this kind in our Tennessee cases. Thus the vendor agreed to make "good and sufficient deeds of conveyance of and to said two tracts of land." The court held that these words created an obligation on the part of the vendor to "execute deeds of conveyance, not only sufficient in point of form, but fully operative, in effect, to pass to and vest the complainant with an indefeasible fee-simple estate." *Cunningham v. Sharp*, 30 Tenn. (11 Humph.), 116.

An agreement of the vendor to make or cause to be made "a deed in fee for said land" was held to mean, "not simply a deed good in form, but one

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fully operative in effect to pass to the complainant an indefeasible fee-simple estate." *Topp v. White*, 59 Tenn. (12 Heisk.), 165, 177.

By the contract in this case, Mr. Cross and associates agreed to execute "an apt and proper deed with covenants of general warranty." The contract also recited that the owners "are joint owners" of the tract of land.

As seen above, an agreement on the part of the vendor to execute a warranty deed, a general warranty deed, or a good and sufficient warranty deed implies that his title is good, and binds him to convey a good title. See cases cited under note 11, 39 Cyc., 1446.

Such a contract is not satisfied by deed of a grantor who has not a good title.

Inasmuch, therefore, as Mr. Cross and associates contracted to convey a good title to these lands, unless they have in fact made a deed passing a good title, their contract cannot be said to have been completed or executed, by any delivery to Mr. Baker. He had no authority to waive any provision of the original contract so far as the proof shows.

"An executed contract is one which both parties have fully performed the terms of the contract by them to be performed. An executory contract is one in which the parties have not yet performed the terms of the contract by them to be performed. It consists of mutual outstanding promises." Page on Contracts, section 18.

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“An executory contract is one in which a party binds himself to do or not to do a particular thing, whereas an executed contract is one in which the object of the agreement is performed. . . . An executory contract, it is said, conveys a chose in action while an executed contract conveys a chose in possession. . . . An executed contract consists in the performance of everything necessary to be done according to the terms of the contract between the parties contracting so as to fully invest the party contracted with dominion of the thing parted with.” 6 R. C. L., 590.

To like effect, see our own cases of *Hale v. Sharp*, 44 Tenn. (4 Cold.), 275; *Hardwick v. American Can Co.*, 113 Tenn., 657, 88 S. W., 797; *Topp v. White*, 59 Tenn. (12 Heisk.), 165.

It therefore follows that if Mr. Cross and his associates do not possess good title to this tract of land, their contract with the defendant cannot be said to have been executed by mere delivery of a deed formally correct. They contracted to convey good title, and they have not done so. They have not yet performed the terms of the contract by them to be performed. They have not fully invested the vendee with dominion of the thing parted with. They have conveyed a title in action and not a settled title.

The case then turns on the condition of the title to these lands which Cross and associates undertook to pass.

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As heretofore stated, these lands were conveyed by Buttram, clerk and master, to Cross, Hall, and Shaver. Mr. Cross took a deed from Hall and from Shaver's executors to himself and then undertook to pass the title by his own deed to defendant, in which his wife joined.

Edward Shaver, who owned a one-third interest in this property, seems to have died testate, leaving a widow and children surviving him. So far as the record shows, the widow is still alive. Mr. Shaver was a resident of Jamestown, N. Y., and his will was there probated in April, 1904. It has been filed for record in this State, and its material provisions are in the following words:

"I, Edward Shaver, of the city of Jamestown, N. Y., being of sound mind and memory, do make and publish and declare this to be my last will and testament, that is to say:

"(1) After all my lawful debts are paid and satisfied, I give and bequeath to my wife, Louise Shaver, the use of all my property, both real and personal, during her natural life, together with so much of the principal of my estate as she may deem necessary for her proper maintenance and support."

The second, third, fourth, fifth, and part of the sixth clauses of the will make bequests and provisions for the children and certain relatives of the testator. The concluding sentences of the sixth clause of the will are in these words:

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"I hereby grant to my executors the power of sale of my real estate and power to execute the necessary conveyances thereof. I likewise make, constitute and appoint Edward L. Hall and George R. Butts executors of this my last will and testament, hereby revoking all former wills by me made."

Mrs. Shaver is not before the court in this case, and, of course, what we say in regard to her powers under the will does not determine or fix those powers, but is only said in consideration of the state of the title here undertaken to be passed by the complainant in this case.

The gift by the testator of the use of all his property, real and personal, to his wife for her life, undoubtedly created in her a life estate in all said property, real and personal. *Gourley v. Thompson*, 34 Tenn. (2 Sneed), 387; *McKee v. McKee* (Ch. App.), 52 S. W., 320; 40 Cyc., 1615. Moreover, the gift to Mrs. Shaver in this connection of said property for life, "together with so much of the principal of my estate as she may deem necessary for her proper maintenance and support," may perhaps confer on her, by implication, a power of sale as to all the property, if in her judgment any part of it should be required for the purposes indicated. If such a power is conferred, the necessity of a sale would be a matter to be controlled by her discretion. *Matthews v. Capshaw*, 109 Tenn., 480, 72 S. W., 964, 97 Am. St. Rep., 854.

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The dominant intention of the testator seems to have been to provide for his wife's support and comfort.

Having undoubtedly conferred on her a life estate in all his property, real and personal, and his intention having been to secure her support, this power of sale given to the executors apparently cannot be so construed as to deprive her of her life estate; that is to say, they cannot, during the widow's lifetime, dispose of her property without any consultation with her or without her joining in the deed. Moreover, if a power of sale be given to her, such a power conflicts with the power of sale given to the executors, if that latter power be construed as conferring upon them authority to sell during the life of the widow.

As suggested by counsel for defendant, the probable construction of the will may be that the testator intended the executors to exercise the power of sale conferred on them after the death of the wife in order to carry out other provisions of the will.

What is the proper construction of the will we are not called on to determine. The necessary parties are not before us. Enough has been said, however, to show that the right of these executors to make a conveyance of the Shaver interest in these lands during Mrs. Shaver's life is, to say the least of it, extremely doubtful.

If they have no such right, then the title tendered by complainants in this case is defective to one-third undivided interest in all the lands involved.

The lands lie both north and south of the latitude line. As to one tract of 160 acres lying north of the latitude line, there is outstanding a Kentucky patent which is concededly the oldest and best title, and which covers the 160-acre tract. The complainant claims to have tolled the title to this tract of land by possession under younger title papers. There is a question as to the location of this possession. But, waiving this, the character of the possession is doubtful. It was a barn which Cross built upon the land, and in which he fed his cattle during feeding time. These cattle were out on the range in suitable seasons. There was no lock on this barn. Our court has not so far held a structure of this character to be a sufficient evidence of adverse possession.

Even in cases where a dwelling house had been constructed, the court has held that if the doors be left open, such a possession will not be sufficient. *Allen v. Suseng*, 41 Tenn. (1 Cold.), 204; *Davidson v. Phillips*, 17 Tenn. (9 Yerg.), 93, 30 Am. Dec., 393; *Greer v. Wroe*, 33 Tenn. (1 Sneed), 246.

The court has also held that pens for feeding hogs or cattle occasionally did not constitute sufficient evidence of adverse possession. *Hubbard v. Godfrey*, 100 Tenn., 150, 47 S. W., 81; *Pullen v. Hopkins*, 69 Tenn. (1 Lea), 741; *Hicks v. Tredericks*, 77 Tenn. (9 Lea), 491.

There are others detached parcels of land in this tract, to which the chancellor was of opinion that complainant did not have good title. These titles de-

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pend largely upon possessions. The possessions as to their character, location, and continuity are subjects of parol controversy.

So that we have a case in which the title tendered by the complainant as to a one-third undivided interest in all the land is doubtful upon the record. The necessary parties are not before the court to enable this title to be fixed and declared herein.

Again we have a possession of dubious character relied on to establish ownership to the whole of 160 acres and the title to other parts of the land is dependent upon the testimony of witnesses as to possessions.

Under the circumstances, it cannot be said, in our opinion, that the complainant has complied with the agreement to furnish a good title. He has not completed and executed his contract.

On the other hand, if we regard his bill as one for specific performance, he is not entitled to the relief sought.

"In a suit by the vendor to enforce performance of a contract for the sale of land, the vendee will not be compelled to accept the title unless it is a marketable one; that is, one which will not expose him to litigation. To force upon the vendee a title which he may be compelled to defend in the courts is to impose upon him a hard bargain; and this a court of equity, in the exercise of its discretion, will refuse to do, irrespective of the question whether the title is actually good or bad." 36 Cyc., 632.

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“Where the title depends upon the existence of a fact, which is not a matter of record, and the fact depends for its proof entirely upon oral evidence, the case must be very clear by the vendor to warrant the court in ordering specific performance. The opinion of the chancellor or of the appellate court can have little, if any, curative effect upon a doubtful title, where the doubt relates to a matter of fact, since a disputed fact may be proved in one litigation to-day, and disproved in another between different parties to-morrow.” 36 Cyc., 635.

Our own authorities are fully in accord: *Mullins v. Aiken*, 49 Tenn. (2 Heisk.), 535; *Cunningham v. Sharp*, 30 Tenn. (11 Humph.), 116; *Topp v. White*, 59 Tenn. (12 Heisk.), 165; *Buchanan v. Alwell*, 27 Tenn. (8 Humph.), 516; *Collins v. Smith*, 38 Tenn. (1 Head.), 255.

Many other questions are raised on this record, and the case has been fully argued and has required much investigation upon the part of the court. We think what has been said, however, is sufficient to dispose of the controversy, and further elaboration is not required.

It results that the decree of the chancellor will be affirmed, and the case remanded for further proceedings in accordance with that decree. The complainant will pay the costs of this court, and the costs below will be adjudged by the chancellor.

R. F. BREWER *v.* DE CAMP GLASS CASKET Co. *et al.*

(*Knoxville*. September Term, 1917.)

1. CORPORATIONS. Foreign. Attachment. Service.

Thompson's Shannon's Code, section 4515, declares that in actions commenced by attachment of property without personal service of process the attachment may be sued out or suit brought in any county where the real property lies or any part of the personal property may be found, while section 5211 authorizes an attachment against the property of a nonresident debtor or defendant. Sections 4539-4541, inclusive, provide for institution of actions against corporations either resident or nonresident by service of process on certain designated officers or agents. Acts 1859-60, chapter 89, embodied in Thompson's Shannon's Code, section 4542, declares that where a corporation, company, or individual has an office or agency or resident director in any county other than that in which the chief officer or principal resides, service of process may be made upon any agent or clerk employed therein. Sections 2549 and 4543-4546, respectively, relate to service on foreign corporations having no office or agency in the State and to substitutionary service on foreign corporation not domesticated and having neither property nor localized business. *Held*, that as section 4516, which apparently restricted the scope of service on agents, was enlarged by Acts 1859-60, chapter 89, a foreign corporation may be served by attachment of its property in any county where such property is found, regardless of the fact that its directors and officers reside in another county; this being particularly true where it did not appear that the corporation was at that time doing business in the State so as to render service of process on resident directors and officers valid. (*Post*, pp. 102-109.)

Acts cited and construed: Acts 1859-60, ch. 89; Acts 1887, ch. 226.

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Cases cited and approved: *Coke & Coal Co. v. So. Steel Co.*, 123 Tenn., 429; *Toppins v. Railroad Co.*, 73 Tenn., 600; *Green v. Snyder*, 114 Tenn., 101; *Turcott v. Railroad*, 101 Tenn., 102; *Coke & Coal Co. v. Steel Co.*, 123 Tenn., 428; *Dillingham v. Insurance Co.*, 120 Tenn., 302; *Toledo Railways & L. Co. v. Hill*, 244 U. S., 49; *International Harvester Co. v. Kentucky*, 234 U. S., 579; *St. Louis S. W. R. Co. v. Alexander*, 227 U. S., 218.

Code cited and construed: Sec. 4515, 4542, 4539-4542, 2549, 4543-4546; Sec. 4516 (1858).

2. APPEAL AND ERROR. Equity cases. Trial de novo.

While the general rule is that on appeals in chancery the trial is *de novo*, that relates, not to technicalities of procedure, but to the chancellor's decision on the facts, which does not have the same force as a verdict or finding of fact by a court of law sitting without a jury. (*Post*, pp. 110-112.)

3. APPEAL AND ERROR. Presentation of grounds of review in court below. Service of attachment.

In an action begun by attachment where all of the defendants, including the foreign corporation, appeared, and the parties treated the attachment writ as lawfully levied, contesting only the rights conferred by the levy, objections that there was no proper writ because no notice of garnishment in writing was left with the defendant garnished, and that there was no publication for the defendants, where made for the first time on appeal, will not be considered notwithstanding the suit was one in equity. (*Post*, pp. 110-112.)

Case cited and approved: *Pennington v. Fourth Nat. Bank*, 243 U. S., 269.

4. STIPULATIONS. Appearance. Demurrer.

Where defendants moved to dismiss a bill and in the alternative demurred, it being stipulated that if the motion should be sustained, the demurrer would not be considered an entry of appearance, the motion being disallowed, defendants must be treated as having appeared. (*Post*, pp. 112, 113.)

5. FRAUDS, STATUTE OF. Sufficiency of writing. Signed letters.

Where defendant, by letter, offered complainant employment for

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two years at a fixed compensation, and complainant wrote letters indicating an acceptance, there was a sufficient compliance with the statute of frauds (Thompson's Shannon's Code, section 3142, subsec. 4), even though it be deemed that the written memorandum should be signed by both parties; both defendant and complainant having signed their respective letters. (*Post*, pp. 113-116.)

Cases cited and approved: *Leinaw v. Smart*, 30 Tenn., 308; *Deaton v. Tenn. Coal & R. Co.*, 59 Tenn., 650; *Gregory v. Underhill*, 74 Tenn., 207; *Railroad Co. v. Staub*, 75 Tenn., 397; *Railroad v. Hayden*, 116 Tenn., 672; *Smith v. Neal*, 2 C. B. (N. S.), 67; *Reuss v. Picksley*, 4 Hurlst. & C., 588; *Vogel v. Pekoc*, 157 Ill., 339; *Raphael v. Hartman*, 87 Ill. App., 634; *Sellers v. Greer*, 172 Ill., 549; *Chase v. City of Lowell*, 7 Gray (Mass.), 33; *Ives v. Hazard et al.*, 4 R. I., 14; *Himrod Furnace Co. v. Cleveland & M. R. Co.*, 22 Ohio St., 451; *Kearby v. Hopkins*, 14 Tex. Civ. App., 166; *Martin v. Roberts*, 57 Tex. 564.

Cases cited and disapproved: *Wilkinson v. Heavenrich*, 58 Mich., 574; *Co-operative Tel. Co. v. v. Katus*, 140 Mich., 367; *Adams v. Harrington Hotel Co.*, 154 Mich. 198; *Houser v. Hobart*, 22 Idaho, 735;

Code cited and construed: Sec. 3142, subsec. 4. (T-S.).

 FROM SULLIVAN.

Appeal from the Chancery Court of Sullivan County.—HAL. H. HAYNES, Chancellor.

SUSONG & BIDDLE, COX & TAYLOR and H. G. MORISON, for appellants.

J. READ VOIGT and W. M. SIMPSON, for De Camp Glass Casket Co.

HEAZEL & CAMBLOS, for First Nat. Bank of Kingsport.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

The bill was filed to attach a fund belonging to the defendant company in the First National Bank of Kingsport. There was a motion to dismiss the bill and in the alternative a demurrer in case the motion should fail. It was agreed between the parties that if the motion should be sustained the demurrer should not be considered an entry of appearance. The chancellor disallowed the motion and overruled the demurrer, but, under the statute applicable to the subject, granted an appeal to this court.

The defendant company is a foreign corporation that has not complied with our statutes authorizing such corporations to do business in the State, but its president and secretary and treasurer and several of its directors, all mentioned in the bill, reside in Tipton county, of this State. It has no office or place of business in Sullivan county, but has property there, consisting of about \$10,000 on deposit in the First National Bank of Kingsport in that county, which bank is made a defendant.

The complainant sues on a contract for personal services which will presently be more particularly mentioned.

The business of the corporation, as described in the bill, was the making of glass burial caskets and also other articles of glass. It contemplated building a factory for these purposes at Kingsport and had obtained an option on ten acres of silicate lands.

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Its purpose was to construct a plant that would cost about \$75,000. It employed the complainant as its general superintendent, as he alleges, for the period of two years at the price of \$5,000 a year, payable in installments as he should desire, and at the end of each year he was to have a certain proportion of the stock. The bill alleges, in addition to the foregoing matters, that the defendant company was a "foreign investment company," and that it had been engaged in the sale of its stock in Sullivan county, "and perhaps other counties in this State." After alleging that the defendant company had not complied with our laws for the domestication of foreign corporations, the bill continued:

"But it has complied with the act of September 27, 1913, being chapter 31 of the printed acts of said year and familiarly known as the 'Blue Sky Law.' "

Among other requirements of the statute referred to, such corporations as it applies to were required to file with the Secretary of State an authorization to accept service of process when suit should be brought in any county of the State. The defendant company filed such authorization, and on process being sent to him, directed to the sheriff of Sullivan county, where the bill was filed, the Secretary of State acknowledged service in the name of the defendant company. This is the first ground on which the complainant insists that the court acquired jurisdiction of the defendant company. The chancellor held

that the act of 1913 referred to did not apply to corporations of the class to which the defendant belongs. The first question suggested is whether this decision of the chancellor was correct. This question we pretermit as unnecessary to a decision of the cause.

The complainant's chief claim to effective jurisdiction over the defendant is based on his attachment of its funds in the hands of the First National Bank of Kingsport, on the ground of the defendant's non-residence. At this point it is necessary that we set out the motion to dismiss, which was made in the chancery court. That motion reads:

"Come all the defendants, and appearing specially for the purpose of denying the jurisdiction of the court in this cause, except First National Bank, and moved the court to dismiss the bill in this cause as to them, because it appears from the bill and record in the cause that this court has not jurisdiction of the persons of these defendants, because it is alleged in the bill that said company is a foreign corporation with officers and agents in Tipton county, Tenn., upon whom process can be served, and that the other defendants are residents of Tipton county, Tenn., and this suit must be brought in the county where said officers and agents of said De Camp Glass Casket Company reside, or are found, and in the county where said other defendants reside or are found."

The predicate of the motion is that, where there is an office or agency in any county of the State, the

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foreign corporation to which it belongs must be sued there, and cannot be proceeded against by attachment of its property in lieu of personal service in any other county where its property may be found.

It is not a sound proposition that because suit may be brought and personal service had on an agent of a non-resident corporation, in one or more counties of this State, where it has an office or agency, on causes of action growing out of or connected with the business of such corporation, an action may not be commenced against it, on those or other causes of action, by original attachment in another county where it has no such office or agency, but in which it has property located. The reverse is true. To hold differently would, in our judgment, be a perversion of our statutes, and would greatly narrow the remedies of our citizens against non-resident corporations. A non-resident corporation might own real or personal property, or both, in many counties of the State, with an office or agency in only one. It would be unreasonable to require a citizen of the State having a demand against such non-resident to go to a distant part of the State, to bring his suit, when there is property in his own county out of which satisfaction might be had. Indeed, such a requirement would make it necessary for the citizen, before bringing his attachment suit, to make inquiry in every county of the State for the purpose of ascertaining whether his non-resident debtor had an office or agency located in any one of the counties. It does not appear why he should be subjected

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to that inconvenience and expense. There is nothing in our statutes to justify such an imposition.

In Shannon's Code (Thompson's Edition) section 4515, it is provided that:

"In actions commenced by the attachment of property without personal service of process, . . . the attachment may be sued out or suit brought in any county where the real property, or any portion of it, lies, or where any part of the personal property may be found."

Section 5211 declares:

"Any person having a debt or demand due at the commencement of an action . . . may sue out an attachment at law or in equity, against the property of a debtor or defendant in the following cases: (1) Where the debtor or defendant resides out of the State."

These two sections lay down the general rule for obtaining effective jurisdiction or non-resident defendants; that is, by attachment of their properties in any county of the State where it may be found. We now reach another class of cases, those covered by sections 4539 to 4541, inclusive. This class is one in which a suit may be brought against a corporation, either resident or non-resident (*Coke & Coal Co. v. Southern Steel Co.*, 123 Tenn., 429, 131 S. W., 988, 31 L. R. A. [N. S.], 278), in the county where the company has its chief office, by service of process on certain designated officers or agents in a prescribed order of precedence. Then comes the Acts of 1859-60, chapter 89, now em-

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bodied in Shannon's Code (Thompson's Edition) section 4542. This established a new class of cases, viz., those in which "a corporation, company, or individual, has an office or agency or resident director, in any county other than that in which the chief officer or principal resides." As to these it is provided:

"The service of process may be made on any agent or clerk employed therein in all actions brought in such county against said company growing out of the business of, or connected with, said company's or principal's business."

The residue of the section contains a limitation on its scope, expressed as follows:

"But this section shall apply only to cases where the suit is brought in such counties in which such agency, resident director, or office is located."

That is to say, it shall not forbid cases covered by the preceding sections (4539-4541), nor original attachment suits brought in other counties where there is no office or agency, and where property of a non-resident defendant is found. Under the authority conferred by these four sections (4539-4542), any one who has a lawful demand against a corporation, resident or non-resident, growing out of or connected with the business of such corporation, may bring his suit in the county where the office or agency is maintained, and secure jurisdiction of it by personal service of process on the designated officer or agent. The right is not confined to matters growing out of a particular office or agency; it is broad enough to embrace any right

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of action growing out of the business. Section 4516 (section 2811 of Code 1858) apparently confines the right to causes of action growing out of the particular office or agency, but this has been construed in connection with the amending Acts of 1859-60, *supra*, so that the broad language of the latter ("growing out of the business of, or connected with, said company's or principal's business") expresses the commanding rule. *Toppins v. Railroad Co.*, 5 Lea (73 Tenn.), 600, 603, et seq. A gloss, or interpretative addition has been added by the court by construction, to the effect that in the county where such office or agency exists a suit cannot be brought by original attachment, on the ground of non-residence, thereby to obtain jurisdiction of the person of the defendant in lieu of personal service of process, but that the action must be *in personam*, process must be served on the officer or agent mentioned or referred to in these statutes. *Green v. Snyder*, 114 Tenn., 101, 84 S. W., 808. This case is referred to by counsel for defendant as authority for the broader doctrine that, where an office or agency exists anywhere in the State, the plaintiff or complainant must resort to that county, and there bring his suit, and he is precluded from instituting an original attachment proceeding, based on the ground of non-residence, in some other county where he has found property of the non-resident defendant. The language of the opinion is broad, we concede; but it must be construed in connection with the facts which the court had before its mind. These facts were that the non-resident, at the

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time the cause of action arose and continuously thereafter, maintained an office and agency in the county in which the attachment suit was subsequently brought. It was on these facts the court held that the plaintiff should have obtained personal service on the resident agent, and that as he could have obtained such service in that county he could not there maintain an attachment proceeding for non-residence in lieu of such personal service. We are referred to *Turcott v. Railroad*, 101 Tenn., 102, 45 S. W., 1067, 40 L. R. A., 768, 70 Am. St. Rep., 661, as an opposing authority. The proposition maintained in that case was simply, that where a railroad corporation, chartered in a foreign State, had carried on its business in Tennessee for a series of years, and kept an office or agency in this State during all that time, it could have been sued here, and jurisdiction obtained by service on its agent, notwithstanding the fact that it had not filed its charter here as required by law, and that one who had a cause of action against it and permitted the period of limitation to elapse before suing could not avoid the bar on the ground that the defendant was in the State in violation of law, and technically a non-resident from the date of its entry. Manifestly this case has no bearing. It should be remarked that the action which was held barred was brought in Shelby county where the railroad company had for years maintained its aforesaid agency.

To present as comprehensive a view as we can, in the limited space at our disposal, of the phase of our

attachment laws which we have just discussed, it will not be amiss to refer again to the case of *Coke & Coal Co. v. Steel Co.*, 123 Tenn., 428, 131 S. W., 988, 31 L. R. A. (N. S.), 278. The court there had under examination the question whether an original attachment on the ground of non-residence could be sued out, and the defendant's property seized, in lieu of personal service of process, where it appeared that the defendant, a foreign corporation, had complied with our statutes prescribing the conditions on which such corporations were permitted to do business here, and had established an office and agency in Hamilton county, where the suit was brought, and had there, for a number of years, carried on its business. It was held that by such compliance the foreign corporation had, by the express terms of our statutes, become domesticated, and must be proceeded against as a domestic corporation, and was not subject to attachment in the form attempted.

Section 2549 of Shannon's Code (Thompson's Edition) presents the case of a foreign corporation that has complied with our statutes but has no office or agency in this State. It is provided that such corporation may be proceeded against by attachment in the manner laid down in the section.

There is still another statute to which we may advert, Acts of 1887, chapter 226. This concerns the case of a foreign corporation not domesticated and which has neither property nor a localized business in this State, but has transacted, in the State, some matter of

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business out of which a cause of action has arisen. This statute is reproduced in Shannon's Code (Thompson's Edition), at sections 4543-4546, inclusive. This statute provides for a form of substitutionary service which is unnecessary to refer to here more particularly.

It is believed that the foregoing discussion presents a fairly adequate view of the several methods by which foreign corporations may be sued in our State. It is apparent that, as the defendant company was a non-resident corporation owning property located in Sullivan county, a debt due from the defendant bank to it (*Dillingham v. Insurance Co.*, 120 Tenn., 302, 108 S. W., 1148, 16 L. R. A. [N. S.], 220), it was subject to be proceeded against in that county by original attachment levied on that debt, and it is immaterial that it had officers and directors who resided in Tipton county, this State. It was not necessary that the suit should have been brought in the latter county. Indeed, we do not see how the corporation could have been brought before the court by service upon the resident directors in Tipton county, since it does not appear from the bill that it was at that time doing any business in Tennessee. *Toledo Railways & L. Co. v. Hill*, 244 U. S., 49, 37 Sup. Ct., 591, 61 L. Ed., 982, 987; *International Harvester Co. v. Kentucky*, 234 U. S., 579, 585, 34 Sup. Ct., 944, 58 L. Ed., 1479, 1482; *St. Louis S. W. R. Co. v. Alexander*, 227 U. S., 218, 33 Sup. Ct., 245, 57 L. Ed., 486, Ann. Cas., 1915B, 77.

In addition to the main question above considered, and which was the only one presented by defendant's counsel, or passed upon in the court below, in respect of the attachment and the jurisdiction which the complainant contended that he had obtained thereby, the point is now made in this court that there was no proper levy of the attachment writ because, as defendants aver, no garnishment notice in writing was left with the defendant First National Bank of Kingsport, but there was only a reading of the attachment writ itself to the president of the bank. Leaving out of view the fact that the bank was made a party defendant to the bill, and appeared in court when the case was heard, although it did not join in the motion, as shown by the decree, and the further fact that an injunction writ was served on the bank which gave it all needed notice for its protection, forbidding it to pay defendant (and thus impounding the money in a manner fully equivalent to a garnishment [*Pennington v. Fourth National Bank*, 243 U. S., 269, 273, 37 Sup. Ct., 282, 61 L. Ed., 713, 715, and note 2, L. R. A., 1917F, 1159]), and the fact that the bill itself in addition contained the fullest notice, and having in mind that it does not appear that a copy of the bill had been served on the bank at the time the decree was rendered, and without passing on the question whether the failure to serve a separate notice on the bank, customary in garnishment cases at law, would be a fatal defect (aside from *Pennington v. Fourth National Bank*, supra), or whether a copy of the bill, together with a subpoena

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to answer, would be equivalent in chancery to such customary notice at law, and likewise not deciding whether the statement of the officer in his return on the attachment writ that he had not only served the writ on the president of the bank, but had attached the fund in the bank, might be treated as evidence that notice had been left with the bank—we say without considering these matters, or their effect, but merely stating them as matters appearing in the record, it is clear that no such objection was made to the attachment in the lower court as is now made in this court. On this ground we decline to consider it. If the point had been made in the chancery court, any irregularity could have been at once, and easily, corrected, or compliance with any missing technicality readily effected. It is indubitably clear, from the very full decree of the chancellor, that the only point presented to him, on this head, by the defendants, was that inasmuch as the bill showed on its face that there were officers and directors of the company residing in Tipton county, this State, the suit could have been brought only there, where personal service of process could have been obtained, and that there could be, under the circumstances stated, no suit brought in another county by an original attachment levied on the property of the defendant company in that county, based on the ground of non-residence. Both sides, in the chancery court, treated the attachment writ as lawfully levied; the contest was only as to its effect, or the rights conferred by such levy. We shall so treat the controversy

here. It would be unfair to the complainant to do otherwise. A different course would have all the effect of an unlawful surprise. Although the general rule is that on appeals in chancery the trial is *de novo*, this does not cover mere technicalities of procedure, but applies only to the hearing on the merits without regard to the chancellor's decision on the facts of the case, as distinguished from the rule obtaining at law, on appeal, that if there is any evidence to sustain the trial judge in a case tried before him his judgment will be affirmed.

The same observations cover the point now first made here that there was no publication for the defendants. We add that before there was time for publication, after the levy of the writ, the defendants appeared in court and made the motion to dismiss, which we have just considered.

The defendants, other than the company—that is, the officers and directors—were made defendants in their personal capacity for the purpose of obtaining alternative relief against them. Their motion to dismiss is the same as that of the company, and rests on no other ground than that the company was not properly in court. That point having been decided adversely to their contention, the motion must be decided against them, as well as against the company.

The motion having been disallowed, the defendants must now be treated as having made their per-

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sonal appearance in court by the filing of the demurrer.

The ground of the demurrer is that the bill shows, on its face, that the contract was not reduced to writing as required by the statute of frauds. The contention is that it should have been signed by both parties, that is, by the company, the employer, and by the complainant, the employee; that, not having been so signed, it was void and unenforceable.

The contract consists of a letter written by the company to the complainant, offering him employment for two years, as its general superintendent, for a consideration therein mentioned. The letter was written April 4th. Complainant alleges in the bill that he accepted it on April 13th. Several letters written later in the month to the company by the complainant, and one in June of the same year, fully recognize the contract as binding on him. Without affirming or denying the proposition of law to the effect that both must sign a contract of the kind appearing in this case, we are of opinion that complainant's letters, just referred to, sufficiently meet any requirement for his acceptance in writing, if any such legal necessity exists.

Waiving a decision of the legal question, we may add that we have no case in our State where it has arisen. We have numerous cases that arose between vendor and vendee, under subsection 4 of our statute of frauds on the subject of the sale of lands, and the making of leases for a longer term

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than one year. Shannon's Code (Thompson's Edition) section 3142, subsection 4. It has been uniformly held, in these cases, that it is sufficient for the vendor to sign, and that he may enforce the contract against the vendee. Some of the same cases apply to leases. The cases under subsection 4 are so numerous, and so well-known to the profession, that they need not be cited. We have cases arising under subsection 5 of the same statute, concerning agreements or contracts not to be performed within the space of one year from the making thereof. In none of these cases was there any question made, or suggestion, as to the need of the signature of both parties. These cases are: *Leinau v. Smart*, 11 Humph. (30 Tenn.), 308; *Deaton v. Tenn. Coal & R. Co.*, 12 Heisk. (59 Tenn.), 650; *Gregory v. Underhill*, 6 Lea (74 Tenn.), 207; *Railroad Co. v. Staub*, 7. Lea (75 Tenn.), 397; *Railroad v. Hayden*, 116 Tenn., 672, 94 S. W., 940. The question has been decided both ways, in other jurisdictions. That both need not sign, see *Smith v. Neal*, 2 C. B. (N. S.), 67; *Reuss v. Picksley*, 4 Hurlst. & C., 588; *Vogel v. Pekoc*, 157 Ill., 339, 341, 42 N. E., 386, 30 L. R. A., 391; *Raphael v. Hartman*, 87 Ill. App., 634; *Sellers v. Greer*, 172 Ill., 549, 50 N. E., 246, 40 L. R. A., 589, *Chase v. City of Lowell*, 7 Gray (Mass.), 33; *Ives v. Hazard et al.*, 4. R. I., 14, 67 Am. Dec., 500; *Himrod Furnace Co. v. Cleveland & M. R. Co.*, 22 Ohio St., 451, 459; *Kearby v. Hopkins*, 14 Tex. Civ. App., 166, 36 S. W., 506; *Martin v. Roberts*,

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57 Tex., 564, 568. Cases to the contrary are *Wilkinson v. Heavenrich*, 58 Mich., 574, 26 N. W., 139, 55 Am. Rep., 708; *Co-operative Telegraph Co. v. Katus*, 140 Mich., 367, 103 N. W., 814, 112 Am. St. Rep. 414; *Adams v. Harrington Hotel Co.*, 154 Mich., 198, 117 N. W., 551, 19 L. R. A. (N. S.), 919; *Houser v. Hobart*, 22 Idaho, 735, 127 Pac., 997, 43 L. R. A. (N. S.), 410. See comment on the last case in note appended to it in 43 L. R. A. (N. S.), 410.

We may add that a strong analogy to cases arising under subsection 5 may be found in those of our cases which arose under that clause of subsection 4, which applies to leases for a longer period than one year. We believe it has been the uniform practice, in our State, for lessors only to sign, notwithstanding the fact that leases very often contain numerous affirmative covenants on the part of the lessee. Practically the universal opinion of the members of our bar is that such leases, signed only by the lessor, when delivered to and accepted by the lessee, are good, and enforceable against the latter although not signed by him. We would not hold differently at this late date. It has been universally considered in this State that the acceptance of such a lease, either verbally or by conduct, would complete the contract between the lessor and lessee and would make it binding and enforceable on both. It is difficult to perceive why the analogy would not be controlling in the kind of a contract

we now have before us; but, as stated, it is unnecessary to authoritatively decide the question.

The result is the decree of the chancellor is affirmed, and the cause remanded for further proceedings.

E. WATERHOUSE v. STERCHI BROS. FURNITURE CO.

(*Knoxville*. September Term, 1917.)

1. BILLS AND NOTES. Indorser before delivery. Notice of protest.

One who indorses a note before delivery is entitled to notice of protest. (*Post*, p. 120.)

Cases cited and approved: *Pharr v. Stevens*, 124 Tenn., 669; *Knott v. Hicks*, 21 Tenn., 162; *Railroad v. Maxwell*, 113 Tenn., 464.

2. PLEADING. Written instrument. "Profert." Demurrer.

The mere profert of a note upon which an action is founded does not make it a part of the declaration, when the declaration is tested by demurrer, "profert" being a formula in pleading, whereby the pleader professes to bring into court an instrument to be shown to the court and his adversary. (*Post*, pp. 120, 121.)

Case cited and approved: *Insurance Co. v. Thornton*, 97 Tenn., 1.

3. PLEADING. Writings. Profert. Oyer.

Where declaration contains profert of note sued on, and oyer asked by defendant is granted, the note becomes part of the declaration. (*Post*, p. 121.)

4. PLEADING. Profert and oyer. Effect.

If an element essential to the existence of a cause of action be omitted from the declaration containing profert, and oyer be craved, the defect will be cured if the instrument supplies or corrects the omission. (*Post*, pp. 121, 122.)

Cases cited and approved: *Edwards v. Weister*, 2 A. K. Marsh. (Ky.), 382; *Nat. Copper Bank v. Davis*, 47 Utah, 236; *Citizen's Bank v. Millett*, 103 Ky., 1.

5. JUDGMENT. Motion in arrest. Grounds.

Where declaration averred that sum "was due by a promissory note here to the court shown, . . . of which note defendant was indorser," and proof showed that the note contained waiver

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of protest, notice of dishonor and presentation by indorser, indorser's motion in arrest could not be granted in view of Acts 1911, chapter 32 (Thompson's Shannon's Code, section 4902a1), providing that no judgment shall be set aside for any error in procedure, unless in the opinion of the court, after an examination of the entire record, it shall affirmatively appear that the error affected the result of the trial. (*Post*, pp. 122, 123.)

Acts cited and construed: Acts 1911, ch. 32.

Code cited and construed: Sec. 4902a1 (T.S.).

6. APPEAL AND ERROR. Presumptions. Judgment.

Where a bill of exceptions incorporating the proof adduced was not preserved, the supreme court must assume that there was sufficient evidence to support the judgment rendered. (*Post*, p. 123.)

FROM RHEA.

Error to the Circuit Court of Rhea County.—
FRANK L. LYNCH, Judge.

GEO. H. WEST, for E. Waterhouse.

RANKIN & FRAZIER, for Sterchi Bros. Furniture Co.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

Sterchi Bros. Furniture Company, defendant in error, brought suit against Waterhouse on a note in the sum of \$1,287.14. In the declaration it was averred that:

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The sum "was due by a promissory note here to to the court shown, made by Dayton Furniture Company to plaintiff, of which note defendant was indorser."

The declaration was demurred to, but the question discussed below was not raised by the demurrer. On the demurrer being overruled, the case was tried before the circuit judge without the intervention of a jury, and he rendered judgment against Waterhouse, who appealed to the court of civil appeals. That court affirmed the judgment.

It appears that the defendant moved in arrest of judgment on the ground:

"The declaration avers that defendant is an indorser of the note sued on, of which the plaintiff is payee, but fails to allege that notice of dishonor was ever given defendant as such indorser, or that defendant had waived said notice."

The contention of the Sterchi Bros. Furniture Company is that the note was indorsed by Waterhouse before delivery, and that, if a bill of exceptions had been preserved by Waterhouse, as there was not, it would have shown the note with an indorsement on the back thereof above Waterhouse's name, as follows:

"Protest, notice of dishonor and presentation is waived."

Such a note appears in the transcript but not identified as a part of the declaration or of any bill of exceptions.

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The main assignment of error in this court by Waterhouse is that the motion in arrest should have been sustained.

The indorser of a note thus irregularly indorsed before delivery is entitled to notice of protest. *Pharr v. Stevens*, 124 Tenn., 669, 139 S. W., 730.

In *Knott v. Hicks*, 2 Humph. (21 Tenn.), 162, where the action was on a promissory note against indorsers, and there was no averment of notice of dishonor having been given to the indorsers, and no averment setting forth a legal excuse for the failure to do so, it was held that the omission in the declaration was subject to a motion in arrest, in that no cause of action whatever was set forth; the omission being one that was not cured by verdict. See, also, *Railroad v. Maxwell*, 113 Tenn., 464, 82 S. W., 1137, and cases cited.

We are persuaded that, notwithstanding this rule, the indorser cannot succeed on his motion in arrest. A distinction must be taken between that ruling and the pending case if it be true or if it must be assumed to be true that the note contract with its indorsement was in proof with waiver of demand, protest, and notice on the part of Waterhouse, as indorser.

The suit was based on the note. That instrument was not copied into the declaration so as to set forth the waiver, but profert was made of it, that being a formula in pleading whereby the pleader professes to bring into court an instrument to be

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shown to the court and to his adversary. It is true that mere profert of a note does not make the instrument, the foundation of the action, a part of the declaration, when that pleading is tested for sufficiency by a demurrer. *Insurance Co. v. Thornton*, 97 Tenn., 1, 15, 40 S. W., 136. The court is confined to the face of the declaration in such test.

But a further rule of pleading is that, when oyer is craved by the defendant and granted by the court, the effect is to make the instrument a part of the record, and the defendant may demur or plead at his option, treating the note as incorporated in the declaration, as though set out *verbatim* therein.

If an element essential to the existence of a cause of action be omitted from the declaration containing profert, and oyer be craved and the instrument be spread upon the record, the defect will be cured if the instrument supplies or corrects the omission. 31 Cyc., 555; *Edwards v. Weister*, 2 A. K. Marsh. (Ky.), 382. The omission to aver demand, protest, and notice would be cured in such event when defendant's waiver thereof, in the note itself, was shown.

The rule is thus summarized in 8 C. J., 906:

"Where a waiver of demand or notice of dishonor is expressed in the instrument sued on, no allegation as to presentment or notice is necessary."

And it has been held that, where the check sued on is set forth with an indorsement across its face showing that payment thereon was stopped, it suf-

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ficiently appears that payment of the check had been countermanded so as to preclude the necessity of alleging notice of dishonor. *National Copper Bank v. Davis*, 47 Utah, 236, 152 Pac., 1180; *Citizens' Bank v. Millett*, 103 Ky., 1, 44 S. W., 366, 44 L. R. A., 664, 82 Am. St. Rep., 546.

Now the question arises: Is the case to be deflected adversely by reason of the fact that the note is brought into the record by proof rather than by way of oyer granted? What substance can there be to support a divergent ruling? It would seem that, if the note becomes a part of the record by way of sworn testimony, it should not weigh less in plaintiff's favor than when it is imported into a pleading of record by way of a *quasi* fiction.

If, then, the proof had shown the note to contain the waiver, the motion in arrest of judgment could not be sustained for the reason that defendant Waterhouse's liability would not be conditional upon his being given notice of protest, but absolute in that regard. An arrest of judgment in such a case is fairly forbidden by Acts 1911, chapter 32 (Thompson's Shannon's Code, section 4902a1), which provides that no judgment shall be set aside for any errors in procedure, unless in the opinion of the court, after an examination of the entire record, it shall affirmatively appear that the error affected the result of the trial.

Waterhouse, as appellant, did not see fit to preserve a bill of exceptions, incorporating the proof

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adduced. In that event, under a familiar rule, we must assume that there was sufficient testimony to support the judgment rendered against him by the circuit judge; in other words, that Waterhouse was found to be liable notwithstanding there was a failure to present or protest the note and to give notice; and such liability would be consequent upon the asserted waiver in the note when produced in evidence as the basis of the judgment.

On the motion in arrest of judgment we should, under the acts of 1911, and do assume, that the note was produced in evidence containing the waiver. Affirmed.

W. T. RUSSELL *et al.* v. AMERICAN ASSOCIATION *et al.*
(*Knoxville*. September Term, 1917.)

1. **STATES.** Agreement or compact with another State. Constitutional provisions. Implied assent.

Under Constitution U. S. article 1, section 10, clause 3, providing that no State shall, without the consent of Congress, enter into any agreement or compact with another State, the formal consent of Congress to a compact between Tennessee and Kentucky looking to the establishment of their boundary line was not necessary, as such consent might be implied. (*Post*, pp. 130, 131.)

Case cited and approved: *North Carolina v. Tennessee*, 235 U. S., 1.

Case cited and distinguished: *Virginia v. Tennessee*, 148 U. S., 503.

Acts cited and construed: Acts 1821, ch. 44; Acts 1821, ch. 206.

Constitution cited and construed: Art. 1, sec. 10, ch. 3.

2. **PUBLIC LANDS.** Boundaries. Compact. Grants.

A joint boundary commission, appointed in 1779 to extend the boundary line of Virginia and North Carolina, running upon thirty-six degrees thirty minutes north latitude, ran a line, supposed to be due west, into Carter's Valley, and the Virginia Commission ran a line, known as Walker's line, from thence to the Tennessee river, leaving an unsurveyed gap from Deep or Clear fork to the first crossing of Cumberland river, which line deflected and reached the river on thirty-six degrees forty minutes north latitude. A compromise agreement was made in 1820, and thereafter ratified, adopting the Walker line from Cumberland gap to the Tennessee river and the line of thirty-six degrees thirty minutes north latitude from thence to the Mississippi, whereby Kentucky yielded the land between Walker's line and thirty-six degrees thirty minutes east of the Tennessee river, to Tennessee, which agreed that all vacant land should be the property of and subject to the disposition of Kentucky. Complainants in ejectment claimed under a grant from Tennessee

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in 1849, and defendants claimed under a grant from Kentucky in 1880, the land lying between the Walker line and a line on thirty-six degrees thirty minutes north latitude. *Held*, that under the compact the Kentucky grant was valid, though the land was in Tennessee, and that Kentucky could not have abandoned such right by mere implication or by any conduct short of a clear and unmistakable affirmative act indicating a purpose to repudiate ownership. (*Post*, pp. 131-134.)

Cases cited and approved: Blair v. Pathkiller, 10 Tenn., 407; McConnell v. Mousepaine, 10 Tenn., 438; Gillespie v. Cunningham, 21 Tenn., 19; Phy v. Hatfield, 122 Tenn., 694; Brannon v. Mercer, 138 Tenn., 415.

Case cited and distinguished: Sharp v. Van Winkle, 86 Tenn., 15.

3. PUBLIC LANDS. Estoppel. After-acquired title.

Since a State in granting lands conveys without covenant, the doctrine of estoppel does not apply to a grant from the State so as to pass an after-acquired title, and such grant passes only the title the State then had. (*Post*, pp. 134-136.)

Case cited and approved: St. Louis Refrigerator, etc., Co. v. Langley, 66 Ark., 48.

Case cited and distinguished: Casey v. Inloes, 1 Gill (Md.), 430.

FROM CLAIBORNE.

Appeal from the Chancery Court of Claiborne County.—HUGH G. KYLE, Chancellor.

FRANK PARK, JR., and CHAS. T. CATES, JR., for appellants.

MONTGOMERY & MONTGOMERY and SAMPSON & SAMPSON, for appellees.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

Complainants filed a bill to eject defendants from two tracts of land, of 5,000 acres each, alleged to have been granted by the State of Tennessee in 1849; one tract to Jacob Peck, who for many years was an associate justice of this court, the other to his son, Adam C. Peck. The beginning corner of the first-named grant is at the corner of the States of Virginia and Kentucky on the north boundary line of this State, near Cumberland gap; and the second grant lies immediately west of the first. Both are located between what is known as the Walker line of 1779-80 and the latitude line of 36 degrees and 30 minutes north.

A brief history of the boundary line, run from time to time, is necessary in order to understand all phases of the pending litigation.

The unmarked parallel of latitude of 36 degrees and 30 minutes north was made by royal charter the boundary line between the colonies of Virginia and North Carolina, and that parallel was therefore the true line dividing the State of North Carolina from Virginia, and later Tennessee from Kentucky.

In 1779 the legislature of Virginia named Thomas Walker and Daniel Smith on the part of that State, and North Carolina named Col. Richard Henderson and William B. Smith as members of a joint commission to run and mark an extension of the boundary line between those states, of which the

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territory now within the States of Kentucky and Tennessee were parts, respectively. After fixing upon the point of beginning as being in latitude 36 degrees and 30 minutes, "to the satisfaction" of all, they ran a line, which was supposed to be due west, about forty-five miles into Carter's valley. Here a disagreement between Walker and Henderson led to a separation. The Virginia commissioners continued independently, and ran what is known as Walker's line to the Tennessee river, leaving an unsurveyed and unmarked gap, however, from Deep or Clear fork to the first crossing of Cumberland river, a distance of about ninety-seven miles. Later surveys developed the fact that Walker's line deflected throughout to the north, owing to improper allowance for the variation of the needle, and as a result the Tennessee river was reached near latitude of 36 degrees and 40 minutes, or more than twelve miles north of the true latitude line. The discovery of this deflection led the State of Kentucky in the opening years of the nineteenth century to insist upon a correction and to stand for a reclamation of the strip from the State of Tennessee. After several futile negotiations between the two commonwealths covering a period of nearly two decades, the legislature of this State named two of its ablest lawyers, Felix Grundy, who had been Chief Justice of Kentucky, and who later represented this State in the United States Senate, and was attorney-general in the cabinet of President Van

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Buren, and William L. Brown, who subsequently was a justice of this court, as commissioners to negotiate a treaty settling the dispute. Kentucky on her part named John J. Crittenden, one time a senator from that State and attorney-general in the cabinets of Presidents Harrison and Tyler, and Robert Trimble, who before that time was on the bench of the Kentucky court of appeals and who later was a justice of the supreme court of the United States. Judge John Rowan, of the court of appeals of Kentucky, also acted for that State in the negotiations which led up to the signing of the compact.

It may safely be asserted that never in the history of this country have two commonwealths met for treaty on any other occasion where they were represented by men of equal legal ability.

A compromise was embodied in a treaty of date February 2, 1820, which was ratified by the legislatures of the States represented. Broadly speaking, the Walker line was adopted from Cumberland gap to the Tennessee river, while between that stream and the Mississippi river the true latitude line was made the boundary line. These facts account for the offset in the north boundary line of this State at the Tennessee river, so plainly shown by maps of the two States. In consideration of Kentucky's yielding to Tennessee sovereignty over the strip lying between the latitude line and the Walker line,

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east of the Tennessee river, it was agreed by Tennessee that all vacant land should be "the property of, and subject to the disposition of, the State of Kentucky," and that any grants which Kentucky might make were to be recognized as valid by the courts of this State.

Minor misunderstandings as to the true location of Walker's line continued to arise, due in part to the fact that the gap above referred to had never been marked on the ground. In 1821 a joint commission, composed of Wm. Steele, on the part of Kentucky, and Absolom Looney, on the part of this State, surveyed, but inadequately marked this gap in, and as a part of, Walker's line; and their acts were confirmed by the respective legislatures in November, 1821. Acts Tenn. 1821, chapter 44; Acts Ky., 1821, chapter 206.

Growing out of such insufficient marking of the line by Steele and Looney, disputes still constantly arose as to the true location, and from a standpoint of showing jurisdiction in the respective commonwealths in the enforcement of their criminal laws, a more accurate survey and a detailed and permanent marking was found necessary. Therefore, in 1859, a joint commission, composed of Benjamin Peeples and O. R. Watkins, representing this State, and Austin P. Cox and C. M. Briggs, representing Kentucky, undertook to run and mark the line as adopted in the compact of 1820.

The phraseology of that compact in respect of the line to be re-run along the territory involved in this litigation was:

“Walker’s line, as the same is reputed, understood, and acted upon by the two States, their respective authorities and citizens.”

The boundary commission of 1859 made an earnest and painstaking effort to carry out the true intent of the compact, and their work, promptly approved by the two legislatures, has sufficed to define the boundary between the two States till this day. The commission had the aid of skilled engineers, and at great expense marked the line by planting stone monuments. Their report, a duplicate, original of which is in the record of this cause, upon examination evidences as thorough work as the topography of the sections traversed would reasonably admit of.

One of the contentions of appellants is that, since the national Congress has never formally consented to or sanctioned the compact of 1820 between the States of Kentucky and Tennessee, that compact is invalid because in conflict with article 1, section 10, clause 3 of the federal Constitution which provides that:

“No State shall, without the consent of Congress, . . . enter into any agreement or compact with another State,” etc.

This contention has been answered by the supreme court of the United States in *Virginia v. Tennessee*, 148 U. S., 503, 13 Sup. Ct., 728, 37 L. Ed., 537, where it was said:

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“The Constitution does not state when the consent of Congress shall be given, whether it shall precede or may follow the compact made, or whether it shall be express or may be implied. . . .

Where the agreement relates to a matter which could not well be considered until its nature is fully developed, it is not perceived why the consent may not be subsequently given. Story says that the consent may be implied, and [it] is always to be implied when Congress adopts the particular act by sanctioning its objects and aiding in enforcing them. . . . Knowledge by Congress of the boundaries of a State, and of its political subdivisions, may reasonably be presumed, as much of its legislation is affected by them, such as relate to the territorial jurisdiction of the courts of the United States, the extent of their collection districts, and of districts in which process, civil and criminal, of their courts may be served and enforced. . . .

“The approval by Congress of the compact entered into between the States upon their ratification of the action of their commissioners is fairly implied from its subsequent legislation and proceedings.”

See, also, *North Carolina v. Tennessee*, 235 U. S., 1, 35 Sup. Ct., 8, 59 L. Ed., 97.

The next insistence of appellants is that since the lands lie within the boundary lines of this State, only the State of Tennessee had power to grant the lands in dispute.

The contrary was held in respect of lands lying between the line of latitude 35 degrees and 30 minutes and the Walker boundary line which were granted by Kentucky in the year 1851. *Sharp v. Van Winkle*, 12 Lea (80 Tenn.), 15. It was there said, in reference to the compact of 1820:

“It is obvious that the State of Tennessee, by this convention, parted with all its title to the lands mentioned which were claimed under the other States named, and if not in terms, in plain legal effect; granted to the State of Kentucky the vacant and unappropriated land specified, with an exemption from taxation for five years, if not sooner appropriated by individuals under titles derived from that State. Tennessee could not afterwards rightfully grant any of these lands, and no reason occurs why a general statute of limitations should not apply to them. A grant of land may be made by a State by statute, convention, or treaty reservation, as well as by warrant, entry, or grant proper. *Blair v. Pathkiller*, 2 Yerg., 407; *McConnell v. Mousepaine*, 2 Yerg., 438; *Gillespie v. Cunningham*, 2 Humph., 19. The Henderson grant of 200,000 acres in East Tennessee, and the grant to Gen. Greene of 25,000 acres in Middle Tennessee, were made by North Carolina by statute; Meigs’ Dig., section 1815. Lands are granted by the State whenever the State makes a valid disposition or surrender of its interest therein.”

Counsel of appellants undertake to distinguish the pending case by a reference to the fact that the Kentucky patents to appellees were issued in 1880, and by an assertion that the joint commission of 1859, not being able to find any marks of the old Walker line, undertook to abandon that as a boundary line; and, further, that it adopted a new and independent line, which in ratification by the two States became the true line, in respect of lands south of which Kentucky did not retain or stipulate for the title or the right to grant, on its part. The reply is manifold.

(a) This court held in *Sharp v. Van Winkle*, *supra*, that Tennessee had made a legislative grant to Kentucky of such unappropriated lands, which lands were to continue, however, under the sovereignty of Tennessee. As such grantee it is difficult to understand how Kentucky could abandon her rights by mere implication, or by any conduct short of some clear and unmistakable affirmative act indicating a purpose to repudiate ownership. *Phy v. Hatfield*, 122 Tenn., 694, 126 S. W., 105, 135 Am. St. Rep., 888, 19 Ann. Cas., 374; *Brannon v. Mercer*, 138 Tenn., —, 198 S. W., 253. It was not a mere power or privilege to make disposition that was granted to our sister commonwealth by the compact of 1820, but a right to dispose as owner, vested with title to that end, subject, of course, to the right of Tennessee to tax and govern as parts of the domain over which her sovereign power extended.

(b) If there had been an abandonment by Kentucky and a reversion of title to this State, such, according to appellant's own argument, must be assumed to have occurred in 1859-60. It is insisted that as Tennessee granted the lands to the Pecks in 1849, her after-acquired title, thus assumed, would inure to the benefit of the Pecks. This would not be the result.

The point was well ruled in *Casey v. Inloes*, 1 Gill (Md.), 430, 39 Am. Dec., 658. Since a State in granting lands conveys without covenant "the doctrine of estoppel does not apply to a grant from the State, so as to pass an after-acquired title, and such grant passed only the title the State then had."

See, also, *St. Louis Refrigerator, etc., Co. v. Langley*, 66 Ark., 48, 51 S. W., 68.

In this case the State of Tennessee was without title in 1849, and complainants therefore lack title in themselves to wage successfully a claim in ejectment.

(c) It appears from the report of the commission of 1859 that they found evidences of the markings of Walker made in 1779-80. We quote one paragraph, which relates to that line as it was run past the property in litigation:

"We have seen many of them (Walker line trees) west of the southeast corner of Kentucky, for several miles, and as far westward as he professed to run it, that is to the Clear fork of Cumberland

river, and they were uniformly marked with three chops, fore and aft."

By way of re-enforcement, and to preserve it as an interesting bit of local history, we here quote what is reported in respect of one of the two or more trees found west of Cumberland river, and on the southern line of Logan county, Ky.:

"On another beech tree, near the large one, we saw the names of 'James West, Isaac Bledsoe, 11th March, 1780.' We suppose these men were a portion of Walker's corps. All the chops had the appearance of being very ancient, and had doubtless been made by Walker's party. We did not block any of them, thinking it a shame that every vestige of Walker's ever having run the line should be obliterated; we were fully satisfied without doing it; and the beech stands there now, as it did when the surveyors in 1779-80 left it, not seeming to have lost any of its vigor by the lapse of ages."

The result, as well as the object of the labors of the commission of 1859, was not to run and mark a new line, but to re-mark the original Walker line.

The State of Tennessee gained much as the result of the compact of 1820, due to the willingness of our sister commonwealth to yield her claim to sovereignty over a large area in order not to defeat the wishes of many settlers in the strip to remain citizens of Tennessee. What was granted to Kentucky in the bargain embodied in the compact, by way of compensation, should not at this day be

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denied by indirection or pared down. This court has once refused to give countenance to such an effort; and so far as we represent the sovereign power of this State, we think that that sovereignty may best be vindicated by holding to the spirit as well as the letter of the solemn compact of 1820. Complainants' case being devoid of merit, the chancellor's decree dismissing the bill on demurrer is affirmed.

CAROLINA SPRUCE CO. v. BLACK MOUNTAIN R. CO.

(Knoxville. September Term, 1917.)

1. **CONTRACTS.** Construction of logging road. Extension of time. "Act of God." "Causes beyond its control." "Unavoidably prevented."

Under a railroad's contract to construct and put in operation a road from a timber tract to a main line junction, the provision, unless prevented by other "causes beyond its control," did not refer only to a cause which was an "act of God," that term meaning a happening due directly and exclusively to a natural cause or causes in no sense attributable to human agencies, which could not be resisted or prevented by the exercise of such foresight, prudence, and care as the situation might have called into exercise; but the provision was synonymous with "unavoidably prevented," the words "beyond control" implying a pledge to exercise human agency to the point of excluding negligence, so that unanticipated trouble and delay encountered in a cut by reason of a peculiar mud or clay called "gumbo," much harder to remove than rock, entitled the railroad to thirty days' additional time to finish construction. (*Post*, pp. 142-147.)

Case cited and distinguished: Chicago, etc., R. Co. v. U. S., 194 Fed., 342.

2. **CONTRACTS.** Construction of logging road. "Constructed." "Completed."

Where the road had until June 1st to finish construction of the line, the construction of a road in which the curves were fully tied, but the straight portions of which were half tied, but which enabled an engine and cars with additional ties to be sent forward, and put it in condition to bear any traffic tendered by the lumber company, and where heavy mill machinery was hauled over the line early in April, and the roadway was thereafter steadily improved, it was constructed and placed in operation for

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general traffic; the word "constructed" having substantially the signification of the word "completed." (*Post*, pp. 147-150.)

Cases cited and approved: *Chicago, K. & W. R. Co. v. Makepeace*, 44 Kan., 676; *Guillory v. Avoyelles R. Co.*, 104 La., 11; *Freeman v. Matlock*, 67 Ind., 99; *So. Kan. & P. R. Co. v. Towner*, 41 Kan., 72; *Manchester, etc., R. Co. v. City of Keene*, 62 N. H., 120.

Case cited and distinguished: *Tower v. Detroit, etc., R. Co.*, 34 Mich., 328.

3. CONTRACTS. Construction of logging railroad. Operation. Equipment. "Constructed." "Completed."

The road was constructed and placed in operation, even though the contractor, which had purchased engines, was dependent upon its connecting carriers for its freight car supply, as the word "completed" did not include the equipment of the road with the contractor's own rolling stock, especially where there was no express contract provision that the railroad would purchase rolling stock. (*Post*, pp. 150-152.)

Cases cited and approved: *Courtright v. Deeds*, 37 Iowa, 503; *DeGraff v. St. Paul & P. R. Co.*, 23 Minn., 144.

4. CARRIERS. Construction of logging road. Contract. Freight Rates.

Under a railroad's contract to construct a logging railroad to connect with a main line, and to transport lumber, etc., to a junction on the main line at four cents per hundred pounds in excess of the rates currently in force from the junction, the railroad's charge and collection of four cents, plus the regular through rate charges from the junction, and its receipt of three cents from the connecting carrier for producing the traffic, was authorized, provided there was no discrimination between shippers. (*Post*, pp. 152-154.)

5. CARRIERS. Rates. Originating traffic.

The established and well-known practice among railroad companies to allow to the carrier originating the business an advantage in the distribution or division of the rate has been recognized and by fair inference upheld by the interstate Com-

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merce Commission and the United States supreme court. (*Post*, pp. 154-156.)

Cases cited and approved: U. S. v. Louisiana & P. R. Co., 234 U. S.; 1; U. S. v. Butler County R. Co., 234 U. S., 29.

Cases cited and distinguished: Northern Pine Manf. Ass'n v. Chicago, etc., R. Co., 33 Int. Com. Com'n R., 360; In re Alleged Unreasonable Rates on Meats, 23 Int. Com. Com'n R., 657.

6. CARRIERS. Rates. Discrimination.

Where a railroad contracted to construct a line from a main line junction to a timber tract, and to transport lumber, etc., at a certain rate, the shipper, if entitled to the part of the joint through rate paid by the connecting carriers to the railroad for originating traffic, would have an undue and forbidden preference over other shippers, and a contractual obligation, that it should receive such distribution would not justify such discrimination, and a State court would not enforce such a contract. (*Post*, p. 157.)

Cases cited and approved: So. R. Co. v. Linear, 138 Tenn., 543; Dayton Coal & I. Co. v. Cincinnati, etc., R. Co., 134 Tenn., 221; Roberts v. Nashville, etc., R. Co., 135 Tenn., 48; Louis. & N. R. Co. v. Maxwell, 237 U. S., 94.

7. CONTRACTS. Construction. Validity.

Where a contract may fairly be construed not to violate the law, the courts should incline to give it that construction, and thus maintain its validity. (*Post*, pp. 157, 158.)

Cases cited and approved: Gernt v. Floyd, 131 Tenn., 122; Morgan Bros. v. Coal & Iron Co., 134 Tenn., 228.

8. EVIDENCE. Filing evidence of concurrence in joint rates. Presumption.

It will be presumed that a carrier has complied with the law in respect to the filing of evidence of its concurrence in joint rates established by other carriers, assuming to act for all of those named as participants. (*Post*, pp. 158, 159.)

Cases cited and approved: Louisville & N. R. Co. v. Hobbs, 136 Tenn., 512; Cincinnati, etc., R. Co. v. Rankin, 241 U. S., 319.

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9. INJUNCTION. Decree. Reserving right to correct claim.

On a bill by a lumber company to enjoin a railroad's sale of collateral upon default in the payment of a note given the railroad for constructing a logging road, where it appeared that complainant might have a just claim in some amount not shown by the record for an overcharge on cars equipped with standards placed on gondola and flat cars, the decree entered should reserve to it the right to litigate such claim in a court, or before the Interstate Commerce Commission, as it might be advised. (*Post*, p. 159.)

FROM WASHINGTON.

Appeal from the Chancery Court of Washington County.—HAL H. HAYNES, Chancellor.

HARR & BURROW, for appellant.

J. J. McLAUGHLIN, COX & TAYLOR and J. R. SIMMONDS, for appellee.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

The Carolina Spruce Company, a private corporation, having purchased a large boundary of timber in Yancey county, N. C., was desirous of securing railway facilities for its development. The tract was located about twenty miles from the Carolina, Clinchfield & Ohio Railway, a trunk line, and its development required the construction by the Spruce Company, or another, of a tap-line railroad over which the forest products, such as lumber, logs, acid

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wood, etc., might be transported to some junction point on the Carolina, Clinchfield & Ohio Railway. The timber tract was located at or near the base of Black Mountain (Mt. Mitchell), one of the tallest peaks east of the Rocky Mountains, and a tap line to reach it would have to traverse a very rough territory. In order to induce the construction of such a line to the boundary, the Spruce Company offered a bonus to aid the Black Mountain Railway Company in the large expenditure of money such construction would call for.

Omitting to even outline previous contracts entered into in relation to the matter by the complainant and the defendant railway, and alleged breaches thereof by the Spruce Company, we believe it to be sufficient to say that on September 19, 1912, the two entered into an agreement, one of the clauses of which reads as follows:

“The railway company agrees that it will proceed forthwith to construct and place in operation a standard gauge line of railway from a point of connection with the line of the Carolina, Clinchfield & Ohio Railway at Black Mountain Junction to Pensacola, along the route to be selected by the railway company, . . . so that material and machinery of the Spruce Company, necessary for the erection of a sawmill and plant of the Spruce Company, may be transported over the same not later than March 1, 1913, and that the road will be in condition for general traffic not later than April 1, 1913

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(later changed by the parties to May 1, 1913), unless prevented by weather conditions or other causes beyond its control.”

As a part of the bonus sum, a note of \$10,000 was executed by the complainant company to the railway company, which note was secured by a pledge of first mortgage bonds of complainant. At the maturity of the note there was a claim of default in payment, and the collateral was advertised for sale.

The bill of complaint of the Spruce Company was filed to enjoin the sale of the collateral, and it challenged the right of the railway company to collect the note by an allegation that the contract had not been complied with by the railway company. It was alleged that the latter company was obligated to build and equip its line by a date fixed, but had itself made default and failed to earn the bonus, and had seriously injured complainant. Other allegations in the bill and allegations and denials in an answer raised the issues discussed in the body of this opinion.

A cross-bill was filed by the railway company praying for appropriate relief.

In point of fact the railroad did not reach the terminus at or near Pensacola until after March 1, 1913, to wit, on March 22d or 24th of that year. Much proof was introduced touching the stages the construction work had reached on that date and later dates referred to below.

The railway company defended on the ground that a strict compliance within the contract limits

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of time (March 1, 1913, for transportation of sawmill outfit, and May 1st, for general traffic) was "prevented by weather conditions or other causes beyond its control;" and it specified: (a) Bad weather in the winter of 1912-13; (b) scarcity of labor; (c) difficulty in getting a supply of ties for the laying of permanent tracks; and (d) unanticipated trouble and delay encountered in a cut called Summit Cut by reason of a peculiar mud or clay called "gumbo" discovered therein.

We agree with the chancellor in his findings of fact that specifications (a), (b), and (c) did not operate to allow the railway any extension of time for the construction work. So concurring, we shall not burden this opinion by a discussion of these questions of fact.

The chancellor expressed doubt as to the merits of the last specification (in relation to the "gumbo" material in the cut), whether it operated to extend the time. He resolved the doubt, however, against the railway company on the theory that the phrase, "unless prevented by other causes beyond its (the railway company's) control," refers only to causes which were the acts of God, or of public authority. Is the chancellor's view sustainable?

By "act of God" is meant a happening, due directly and exclusively to a natural cause or causes in no sense attributable to human agencies, which happening is not to be resisted or prevented by the exercise of such foresight, prudence, diligence, and care as

the situation of the defendant party may reasonably have called it to exercise.

Since human agency or intervention is to be excluded from creating or entering as an element into such an act causing injury, we have for consideration whether the contract phrase is the legal equivalent of the "act of God," as the chancellor held. We are of opinion that the phrase comes nearer to being synonymous with "unavoidably prevented," and that it can hardly be the equivalent of what is called the act of God; but it cannot mean less than that there must have interposed some hindrance which the railway company, as the actor party, could not foresee or overcome by the reasonable exercise of its powers and the use of the means and appliances that were, or in the exercise of commensurate care should have been, available. What is meant is that the happening must not have been occasioned in any degree by the want of such foresight, care, and skill as the law holds one in like circumstances bound to exercise. The words "beyond control" fairly imply a pledge to exercise human agencies to the point of excluding negligence under the above test, and if this be true human agencies are not excluded from consideration as factors.

In *Chicago, etc., R. Co. v. U. S.*, 194 Fed., 342, 114 C. C. A., 334, it was said in respect of the closely related phrase "unavoidable cause:"

"An . . . 'unavoidable cause' . . . is a cause which reasonably prudent and cautious men

under like circumstances do not and would not ordinarily anticipate and whose effects under similar circumstances they do not and would not ordinarily avoid."

The paucity of decisions construing the words "beyond control" and "unavoidable cause" in commercial and building contracts must be remarked.

Briefly summarized, the conditions encountered in the cut referred to were as follows: A material called "gumbo," a blue mud or clay, was found in large quantity. This is described in the proof as being a very peculiar formation, much harder to remove than rock, requiring three or four times as long to remove, and costing about four times as much. Various appliances were used in efforts to take out this mud or clay. One witness testified:

"That he worked at Summit Cut from the time it was commenced until it was finished; that in the north end of the cut they struck a blue pipe clay, which was the biggest vein of this material that he ever saw; that it was blue, black mud, as stiff as it could be and so hard to handle that you could not do anything with it; that about half of the cut was composed of this clay; that dynamite would shoot it up in blocks—that is, if you loaded it heavy enough you could shoot it up in blocks, as big as a wagon bed; that it would spread it out and you would have to cut into it with shovels and cut it up and load it on the car; that you would have to take a paddle or your hand to pull it off the shovel; that they kept a tub

of water there to dip the shovels in so as to make the mud slip off; that you had to chain the dump cars to the rail in order to keep it from turning them over when they dumped the material because the material would stick to the cars and you would have to take a mattock and rake it off of the bed of the car; that when they first began the cut they commenced on each end and put in plows and scrapers to scrape it out and ran them as long as they could; that when they struck this pipe clay the horses mired down in it and they had to quit that."

The use of wheelbarrows and then of a steam ditcher was resorted to, but the mud would stick to the dipper of the ditcher, and no speed could be made with it. A laborer would stick a pick in the clay, and it would take both of his hands to get it out without bringing any material with it. When it rained the clay would spread out and submerge the track, which had to be jacked up and other timbers placed under it. It was a difficult matter to hold laborers at work; at first they were paid a wage of a time and and a half, and before completion they were paid double time for work in this cut; and even with that the crew was constantly changing; few would work in the cut over a week at a time, making it necessary to carry a number of men as a reserve force. Work was prosecuted day, night, and on Sundays in efforts to remove this material.

The peculiar waxiness, stubborn nature and large quantity of this deposit were beyond reasonable

anticipation, found as it was deposited in a hill, and we think the failure to discover and overcome the difficulties incident to the deposit was not due to negligence on the part of the railway company, or its contractor, under the test above outlined.

The proof shows that the delay in the completion of the roadbed was on this account and amounted to at least thirty days (the railway claims sixty days); and we are of opinion that the railway company was entitled, by reason of the contract provision above quoted, to that additional time within which to finish the construction of its line of railway.

The chancellor held that the complainant had acquiesced in any failure to so complete and waived any damage sustained by it, and thus reached the same result so far as the disposition of the case is concerned.

But it is contended that the railroad was not constructed in a manner to comply with the contract, even after the expiration of such an additional period of thirty days—that not until August 10, 1913 was the roadbed surfaced, ballasted, and fully or adequately tied, and that not until then was the road constructed so as to be capable of safe operation. By the weight of the proof it appears that when track-laying reached the contract terminus at or near Pensacola on or a few days before March 24, 1913, most of the curves were fully tied, but the straight portions of the line were half tied; that is, ties were laid approximately four feet apart. It is shown,

however, that this is customary in railway construction work, since thereby an engine and cars loaded with additional ties could be sent forward over the line and the ties unloaded where needed and inserted at the regulation distance of two feet apart. Before the road was fully tied it was in condition to bear and carry any traffic tendered by the Spruce Company. The rails used were 85-pound steel rails, and these tended in themselves to make the roadbed reasonably stable for slow-moving trains.

It does not appear that any traffic was offered to the railway company by complainant during said thirty days extension period, which was declined. In fact, it appears that as early as the last days of April heavy mill machinery was hauled over the line for complainant, and thereafter the condition of the roadbed was steadily improved, as is above indicated.

Treating June 1, 1913, as the test date for the purpose, arrived at as above shown, was the road at that time constructed and placed in operation for general traffic, within the meaning of the contract? Yes, and prior thereto.

The word "constructed" in such a connection has been treated as having substantially the signification of the word "completed." The latter word has been construed in a number of reported cases, and certainly "constructed" can carry no stronger implication favorable to complainant Spruce Company.

In *Tower v. Detroit, etc., R. Co.*, 34 Mich., 328, in which the opinion was delivered by Chief Justice

COOLEY, it appeared that a note had been executed by Tower to aid in the construction of the railroad, in which note payment was to be made "provided said railroad be completed to Stanton May 1, 1873." The surfacing of the track was not completed by that date. It was said:

"Exception is taken to the judge's remark that the word 'completed,' when made use of in such a contract, may have a different meaning from what it would have in a contract for the construction of the road; but in this he was doubtless correct. In a contract for construction it would mean a completion in accordance with specifications; but in a contract like the one in suit it is not likely the parties have any such exact completion in mind, and a less perfect construction may satisfy its intent, provided the road is in condition to be opened for regular passenger and freight traffic, and is actually in use. The purpose of such a condition, when embodied in a contract made in aid of the road, is accomplished when the road is thus put in condition for regular business."

Other cases are in accord in holding that even where there is a grant of public aid by a county or municipality to a railway company to secure the construction of its line, the word "completed" is held to be so far synonymous with "constructed" as not to be construed to require the road to be perfect on the date set for completion. If there is a substantial compliance and the road is fit to bear reasonably regular trains, carrying all freight and passen-

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gers that offer, the grant is enforceable, through there be some lack in surfacing, ballasting, tying, and though some portion of the work is intended to be replaced with other and better material. *Chicago, K. & W. R. Co. v. Makepeace*, 44 Kan., 676, 24 Pac., 1104; *Guillory v. Avoyelles R. Co.*, 104 La., 11, 28 So. 899; *Freeman v. Matlock*, 67 Ind., 99; *Southern Kan. & P. R. Co. v. Towner*, 41 Kan., 72, 21 Pac., 72; *Manchester, etc., R. Co. v. City of Keene*, 62 N. H., 120.

For a stronger reason would such a substantial compliance suffice where the contract is one that provides for the service of a single industry, rather than of the public at large. If the road was in condition to carry in reasonable safety complainant's products of logs and lumber, and its officers, agents, and employees, its object was attained. On the record it is not to be doubted that the road was constructed to that degree of completion on the true test date, and even prior thereto.

Another position sought to be maintained by complainant is that the railroad was not constructed and placed in operation as the contract contemplated, in that the defendant company never purchased any freight cars for use in transporting its forest products, and it is asserted that the failure of defendant to equip itself with rolling stock has proven most detrimental to complainant.

The record shows that for a freight car supply the railway company was dependent upon its connecting

carriers; but it is also shown that had it purchased such cars in number fairly commensurate with its mileage they would have been few in number, and these few when sent out on interstate journeys would be used by other railways, and could be caused to be returned with great difficulty. In fact it is apparent, if complainant's contention be correct, that an involved system of car accounting and tracing would have to be installed, the cost of which to the defendant would be greatly out of proportion to the benefits accruing to either party to the contract; and that even were this system established it would be impracticable to retain the company's own cars on its branch or tap line of railway. The contract is to be construed in the light of practical railway operation and management, as known to the business world. The railway company did purchase engines. There was no express provision in the contract that the railway company should purchase rolling stock, and none is to be implied from the undertaking on its part to construct and operate the line for the transportation of complainant's products.

Under car service association rules the use of the freight cars of, say the Carolina, Clinchfield & Ohio Railway, by defendant must be paid for by the defendant railway company, and such use is under a system that approximates a temporary letting, in legal effect.

A condition that a railroad shall be completed and the cars running to a certain place is complied

with by the running of hired cars. *Courtright v. Deeds*, 37 Iowa, 503; *Railroad v. Keene*, supra. Even the word "completed" in such a contract does not include the equipment of the road with the company's own rolling stock. *De Graff v. St. Paul & P. R. Co.*, 23 Minn., 144; 146.

We think the contention is without merit, and it appears to be unsupported by any authority.

We find ourselves unable to agree with the truly able chancellor in his ruling on another point:

One of the provisions of the contract relates to the freight rate to be charged by the railway company for the transportation of complainant company's products, and reads thus:

"And that it [the railway company] will transport lumber and forest products manufactured by the Spruce Company from properties now owned by it from said terminal [Pensacola] of said railway to the said junction on the line of Carolina, Clinchfield & Ohio Railway, and will charge the Spruce Company for the transportation of said manufactured lumber, the sum of four cents per hundred pounds in excess of the rates currently in force from Black Mountain Junction, North Carolina."

The railway company charged and collected the four cents, plus the regular through rate charges from Black Mountain Junction to the market terminals, and out of the regular rates from the junction received from the connecting carriers three cents for producing the traffic, thus taking from the two sources seven cents.

The chancellor sustained the contention of the Spruce Company to the effect that inasmuch as the Carolina, Clinchfield & Ohio Railway and the other common carriers participating in the haul allowed the Black Mountain Railway Company three cents per hundred pounds of complainant's products out of their own divisions of the total freight rate from said junction to the markets, the complainant is entitled to benefit by having the four-cent carriage charge named in the contract reduced by said three cents or to one cent per hundred. The chancellor was of opinion that the fair and reasonable construction of the contract is that the defendant railway company would accept through shipments from complainant, and would charge four cents in addition to what would have to be paid connecting carriers for the haul. The chancellor could not reconcile with good faith and fair dealing the railway company's claim that it is entitled to keep said three cents. "It was its duty," he recites in the decree, "to obtain the best rate possible, and any concession it may have gotten should inure to the benefit of complaint, its shipper, for whom it was acting in said matter."

We entertain the view that, in fixing four cents per hundred as its charge "in excess of the rates currently in force from Black Mountain Junction," the railway company was reckoning on a fixed rate for its own haul, and that the complainant contemplated the addition thereto of "the rates currently

in force" for or over the remainder of the route of transportation. The first was a fixed factor, the second or "stem rate" was not, but was subject to fluctuations. By what? Not the action of the defendant railway company, but the action of the participating carriers in naming through rates subject to the approval of the Interstate Commerce Commission. Interstate rates could not otherwise be "currently in force." We are unable to see how the shipper was concerned in the matter of the distribution of the total through rates as between the several carriers. The shipping public is interested in the total charge made for through transportation service, but not in the "divisions" made by and among the participating carriers.

It is a long-established and well-known practice among railway companies to allow to the carrier originating the business an advantage in such distributions or "divisions"—for creating, so to speak, the traffic. This practice, moreover, has been recognized and by fair inference upheld by the Interstate Commerce Commission and the supreme court of the United States.

In *Northern Pine Manuf. Ass'n v. Chicago, etc., R. Co.*, 33 Interst. Com. Com'n R., 360, there was under consideration rates on lumber from producing points in Michigan to consuming points in trans-Mississippi States, through the twin cities of St. Paul and Minneapolis. Upholding the reasonableness of the rates it was said:

"The through rates from the producing points are made by the addition of arbitraries to the so-called 'stem rate' of 18 cents per 100 pounds from the twin cities to both the upper and lower crossings of the Missouri river. Neither the arbitraries nor the 'stem rate' represent actual divisions of the through rates. In general the carrier which moves the traffic from the producing point to the twin cities receives more than the arbitrary, and the carrier from the twin cities to destination receives less than the 'stem rate.' "

Again, in the case *In re Alleged Unreasonable Rates on Meats*, 23 Interst. Com. Com'n R., 657:

"It is necessary to say that, in making the above observations as to the additional allowance for the two-line haul when long distances are involved, it was not intended to intimate that a short line should be confined in its division of the joint rate to merely the amount which an application of the mileage scale would produce. What is a fair division between carriers is to be determined in each case upon the merits of that particular case."

In *U. S. v. Louisiana & P. R. Co.*, 234 U. S., 1, 34 Sup. Ct., 741, 58 L. Ed., 1185, and *U. S. v. Butler County R. Co.*, 234 U. S., 29, 34 Sup. Ct., 748, 58 L. Ed., 1196, it was contended by counsel that where the commission had fixed a joint or through rate on forest products, it had no power to prescribe the proportions or divisions of such rate to be received by each carrier party thereto, when the latter

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had agreed among themselves, but the court held that this power existed so far as to prevent undue preferences to one shipper over another; and, referring to allowances made to tap-line railways by trunk lines, said:

“If the divisions of joint rates are such as to amount to rebates or discriminations in favor of the owners of the tap lines because of their disproportionate amount in view of the service rendered, it is within the province of the commission to reduce the amount so that the tap line shall receive just compensation only for what it actually does.”

Thus, as we conceive, is recognized the right of trunk line participants to compensate a tap, branch, or feeder line of railway on the basis of just compensation for services performed, including in the reckoning an allowance for originating the traffic. Indeed, the sole limitation on the power of the carriers to contract in that regard seems to be fixed on the line of no subversion of the act of Congress by causing, in effect, a discrimination as between shippers.

If for any reason the three-cent concession was illegally absorbed by the defendant railway company, it would not inure to the benefit of complainant, but would stand to be returned to those participants in the carriage who by law were clearly entitled, and, indeed, compelled, to collect the full interstate rate which was currently in force from Black Mountain Junction.

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Viewing and testing from another angle these contentions of the parties, a like result is reached: To adopt the complainant's construction of the contract on this point would make that contract contravene the Interstate Commerce Act, and lead to the contract's denunciation as being in preferential favor of the complainant as a shipper. If the three-cent portion of the joint through rate should inure to the benefit of complainant, it would in so far have an undue and forbidden preference over other shippers of lumber and forest products located on the defendant's line of railway. *Southern R. Co. v. Linear*, 138 Tenn., 543, 198 S. W., 837; *Dayton Coal & I. Co. v. Cincinnati, etc., R. Co.*, 134 Tenn., 221, 183 S. W., 739, affirmed 239 U. S., 446, 36 Sup. Ct., 137, 60 L. Ed., 375; *Roberts v. Nashville, etc., R. Co.*, 135 Tenn., 48, 185 S. W., 69; *Louis. & N. R. Co., v. Maxwell*, 237 U. S., 94, 35 Sup. Ct., 494, 59 L. Ed., 853, L. R. A., 1915E, 665. A contractual obligation cannot support or justify such unlawful discrimination; otherwise the policy of the law could be easily defeated. A State court would not assume jurisdiction and grant complainant a recovery on such an agreement in violation of federal laws.

Where a contract may fairly be construed not to be violative of law, the courts should incline to give it that construction, and thus maintain its validity. *Gernt v. Floyd*, 131 Tenn., 122, 174 S. W., 267; *Morgan Bros. v. Coal & Iron Co.*, 134 Tenn., 228, 262, 183 S. W., 1019, Ann. Cas., 1917E, 42. That such construction may, and we think must, be given the instant contract, we have already seen.

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In relation to these matters complainant company insists that there is no proof that the Black Mountain Railway Company became a "participating carrier," so as to make operative the principles just adverted to. It is argued that though the published lumber tariffs of the Carolina, Clinchfield & Ohio Railway name the Black Mountain Railway Company as a participating carrier, yet formal concurrence on the part of the latter is not shown. It is urged, further, that the Hepburn Act (U. S. Comp. St. 1916, section 8563 et seq.) means that the Interstate Commerce Commission shall require participating carriers to file with that body evidence of their acceptance of or concurrence in joint rates published by other carriers assuming to act for all of those named as participants. Counsel of complainant argue that the presumption is that said commission has complied with the law by calling for the filing of evidence of such concurrence, because it was its duty to do so.

However, a like presumption obtains that the defendant railway company on its part complied as was its duty. We held in *Louisville & N. R. Co. v. Hobbs*, 136 Tenn., 512, 190 S. W., 461, following *Cincinnati, etc., R. Co. v. Rankin*, 241 U. S., 319, 36 Sup. Ct., 555, 60 L. Ed., 1022, L. R. A., 1917A, 265, that it would be presumed that an interstate carrier complied with the law in filing and publishing a schedule of rates. The same reasoning requires the court to presume right conduct and compliance with lawful demands in respect of the filing of evidence

of its concurrence by the defendant railway company.

It follows, therefore, that the chancellor was in error in decreeing in favor of complainant on the claim of right to take the benefit of the three-cent concession to the railway company.

A further contention remains for disposition: Complainant in its assignments of error insists that it has been overcharged on cars that were equipped by it with standards placed on gondola and flat cars to hold lumber in place while in transit. The claim is that under certain conditions 500 pounds per car so equipped must be deducted from the weight of lumber-loaded cars going to destination points out of the State of North Carolina, the tariff stipulations of the regulating authority so providing. It appears that complainant may have a just claim in some amount, not shown in the record before us, under this head; and the decree to be entered in this court will reserve to complainant the right to litigate the same hereafter, in a court, or before the Interstate Commerce Commission for reparation, as it may be advised. We do not adjudicate whether the courts of this State would have jurisdiction in any event of such claim, but leave that and all other phases at large and unprejudiced by anything decreed in this cause.

A decree will pass modifying the decree of the chancellor in the respects set out above, and awarding accordant relief. Costs of the cause, including the costs of the appeal, will be paid two-thirds by complainant, and one-third by the defendant railway company.

H. N. FINE *et al.* v. J. W. LAWLESS *et al.*

(Knoxville. September Term, 1917.)

1. GOOD WILL. Nature of right. Protection.

"Good will" is property in the sense of being a thing subject to be damaged, and an injunction will lie to protect it when the seller of the good will thereafter wrongfully interferes with it or the property conveyed of which the good will is an incident. (*Post*, pp. 165-171).

Cases cited and approved: *Crutwell v. Lye*, 17 Vesey, 335; *Moreau v. Edwards*, 2 Tenn. Ch., 349; *Christian v. Douglass*, Johns. Eng. Ch., 174; *Sanford-Day Iron Works v. Enterprise Foundry, etc., Co.*, 138 Tenn., 457; *Bradford v. Furniture Co.*, 115 Tenn., 610; *Jackson v. Byrnes*, 103 Tenn., 698; *Spiess v. Rosswog*, 63 How. Prac. (N. Y.), 401.

Cases cited and distinguished: *Slack v. Suddoth*, 102 Tenn., 378; *Munsey v. Butterfield*, 133 Mass., 492; *Wentzel v. Barbin*, 189 Pa., 502; *Lee v. Vernon*, 5 Brown's Parl. Cases (10 Ed.), 1803; *McCourt v. Singers-Bigger*, 145 Fed., 103; *Clegg v. Fishwick*, 1 Mac. & G., 294.

2. GOOD WILL. Sale. Stipulation.

Upon a sale of the good will of a business without more, the seller is not precluded from setting up a precisely similar business at another stand in the same locality, and if the purchaser desires to forestall such step he must expressly stipulate against it. (*Post*, pp. 165-171).

3. LANDLORD AND TENANT. Renewal. "Tenant-right of renewal."

While a tenant in possession whose lease contains no provision for renewal cannot compel a renewal, nevertheless he has such a likelihood of procuring a renewal, which is called a "tenant-right of renewal," that equity will protect it. (*Post*, pp. 165-171.)

4. GOOD WILL. Sales. Protection. "Tenant right of renewal."

Where the seller of a business conducted in demised premises assigned the lease and conveyed the "good will," which includes the possibility that old customers will resort to the place and any other positive advantage acquired arising out of the business of the old firm whether connected with the premises where it was carried on or with the name of the late firm; the seller is under an implied obligation not to interfere with the purchaser in his use of the business premises and control of the lease assigned, for that constitutes a part of the good will, and hence, as the purchaser by reason of the assignment of the lease acquired what is known as a "tenant-right" in respect to renewal of the lease, which is the likelihood of a tenant obtaining a renewal though the lease contains no such provision, it was a breach of good faith for the seller during the existence of the lease to obtain a new lease running to him to commence on expiration of the one assigned. (*Post*, pp. 165-171.)

5. TRUSTS. Constructive trusts. Establishment.

Where the seller, who assigned the lease of the demised premises in which the business was conducted before expiration of that lease, obtained from the landlord a lease running to him which was to commence at its expiration, the seller was guilty of such bad faith that equity will require him to hold the lease as a constructive trustee for the benefit of the purchaser who was the assignee of the first lease. (*Post*, pp. 171-174.)

Cases cited and distinguished: *Holt v. Holt*, 1 Ch. Cas., 190; *Mitchell v. Reed*, 61 N. Y., 123; *Bennett v. Vansyckel*, 11 N. Y. Super. Ct., 462; *Crook v. Crook*, 20 Abb. N. C. (N. Y.), 249.

6. TRUSTS. Constructive trusts. Defenses.

In such case, refusal of the landlord to renew the lease to or for the benefit of the purchaser of the business, to whom the first lease was assigned, does not entitle the seller to take a renewal for himself or defeat the constructive trust, for a rule to that effect would open the door to collusion. (*Post*, pp. 175, 176.)

Case cited and approved: *Neal v. Cox*, 7 Tenn., 443.

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Case cited and distinguished: *Keech v. Sandford*, Cas. T. King, 61, 15 Eng. Rul. Cas., 455; *Davoue v. Fanning*, 2 Johns. Ch. (N. Y.), 252.

7. **TRUSTS. Constructive trust. Leases. Assignment.**

Though both the lease assigned to the purchaser and the one obtained by the seller declared that it should not be assigned or transferred by the lessee or by operation of law without written consent of the owner does not prevent the purchaser from insisting on the establishment of such constructive trust, he cannot by that means force the owner to accept him as a tenant and allow him to occupy the premises. (*Post*, pp. 176, 177.)

8. **LANDLORD AND TENANT. "Unlawful detainer." Right to maintain.**

Under Thompson's Shannon's Code, section 5093, declaring that "unlawful detainer" is where the defendant enters by contract either as tenant or assignee and willfully and without force holds over the possession from the landlord or the assignee of the remainder or reversion, a landlord may maintain an action to dispossess a subtenant or assignee holding over, notwithstanding such landlord had lost control of the reversion by demising the premises to another for a term to commence at the expiration of the term of the holding over tenant. (*Post*, pp. 177, 178.)

Cases cited and approved: *McNairy v. Hicks*, 62 Tenn., 378; *Manley v. Rodgers*, 13 Tenn., 217.

Code cited and construed: Sec. 5093 (T.-S.).

· FROM HAMILTON.

Appeal from the Chancery Court of Hamilton County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—W. B. GARVIN, Chancellor.

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THOMPSON, WILLIAMS & THOMPSON and J. L. LEVINE,
for appellants.

COOKE & NOLL and T. S. MYERS, for appellee.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

The bill was filed by Fine (and by his former partner for Fine's use) against Lawless Bros., a copartnership, to restrain by injunction the defendant firm's interference with complainant Fine in the enjoyment of the good will of a business sold to him along with the stock of goods, which business for many years had been conducted by Lawless Bros., at 222 Main street in the city of Chattanooga; and praying to be protected by injunctive process in the matter of a lease of the storehouse which at the same time was transferred to Fine and partner as purchasers of the stock of goods then in the building. Fine, by purchase of his partner, is now the sole owner of the property so acquired.

It appears that Lawless Bros., in January, 1911, entered into a lease contract with the owner of the property, Mrs. A. A. Strong, for a term of five years. Before its expiration, January 1, 1916, to-wit, on August 11, 1913, this lease was assigned to Fine and his associate; but the last-named will not be referred to in the subsequent statement and discussion for the reason noted above.

Lawless Bros. opened up in the same line of business at 252 Main street, without objection or complaint on the part of complainant Fine.

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The contract of sale by Lawless Bros. contained these conveying clauses which follow recitations as to the transfer of the stock of merchandise and fixtures:

"2. The lease which the said Lawless Bros. now have on the lot and store building at No. 222 East Main street, together with all rights thereunder.

"3. The name 'The Wonder Store' under which the business has been and is now being conducted, together with the good will of that name and the business."

Mrs. Strong assented in writing to the transfer of the lease to Fine who, it was recited, was "to have the same rights under the original lease as are granted to Lawless Bros.," and the firm made a formal transfer of the lease.

On June 12, 1916, Fine wrote a letter to Lawless Bros., stating that he had learned of negotiations on their part for a lease of the Strong premises, and protesting against the effort to "upset" him notwithstanding a promise made to aid the writer to get a renewal of the lease; and he stated that the effort to defeat him was an outrage.

Lawless Bros. proceeded, notwithstanding, to close a lease in August, 1916, identical as to terms with the old one. On October 18, 1916, while Fine's term was yet running under the assigned lease, the defendant firm announced to the public in a full page advertisement of a "removal sale" in the Daily News: "We're going back to our old home!" Incorporated in the advertisement as an "indisputable fact" was the

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statement that the firm was going to change their location of business to 222 Main street—"the old stand they occupied for years"—and "submarine prices on everything" were quoted.

Mrs. Strong was also made a defendant and a suit, brought by her to dispossess Fine after January 1, 1916, was sought to be enjoined as one intended to aid Lawless Bros., in getting possession of the storehouse in violation of their contract with Fine.

The chancellor sustained a demurrer of Mrs. Strong, and that ruling was affirmed by the court of civil appeals.

The further rulings and the assignment of error in this court, so far as they are material, are sufficiently indicated in the discussion which follows. We shall not detail them otherwise.

I. As to the rights of Fine against Lawless Bros.:

The doctrine of "good will" has proven to be so salutary in effecting just results that it has been constantly expanding, with the result that the definition of the word itself has been broadened as the doctrine has developed. This was noted in *Slack v. Suddoth*, 162 Tenn., 375, 52 S. W., 180, 45 L. R. A., 589, 73 Am. St. Rep., 881, where it was said:

"It is difficult to define what 'good will' is. Lord Eldon said that it was simply 'the possibility that the old customers will resort to the old place.' *Crutwell v. Lye*, 17 Vesey, 335; *Moreau v. Edwards*, 2 Tenn. Ch., 349. But in *Christian v. Douglass*, Johns. Eng. Ch., 174, it was said that this was too narrow a

view to take of it, and there it was said that it was every positive advantage acquired, arising out of the business of the old firm, whether connected with the premises where it was carried on, with the name of the late firm, or with any other matter carrying with it the benefit of the business of the old firm."

All definitions incorporate as one of the chief elements of good will the advantage accruing to a vendee from the old business stand—the feature we have here to deal with. It does not appear that Lawless Bros. made any effort to use the old name, "The Wonder Store," after selling to Fine.

"Good will" is property in the sense of being a thing subject to be damaged and entitled to the protection of the law (*Sanford-Day Iron Works v. Enterprise Foundry, etc., Co.*, 138 Tenn., 457, 198 S. W., 258), and an injunction will lie to protect it, when the seller of the good will thereafter wrongfully interferes with it or the property conveyed to which the good will is incident. 12 R. C. L., p. 995, and cases cited; *Bradford v. Furniture Co.*, 115 Tenn., 610, 633, 92 S. W., 1104, 9 L. R. A. (N. S.), 979.

When Lawless Bros. sold the good will of the business and transferred their current lease of the business stand, good faith required that they should not thereafter do anything which should tend to deprive their vendee of the benefits and advantages incident thereto.

A distinction may here be noted which will aid in the determination of the rights of the parties litigant.

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Upon a sale of the good will of a business, without more, the selling party is not precluded from setting up a precisely similar business at another business stand in the same city, or even in the vicinity. If the purchaser desired to forestall such a step, he must expressly stipulate against it in the contract. *Jackson v. Byrnes*, 103 Tenn., 698, 54 S. W., 984; 20 Cyc., 1279.

But, without such a stipulation, the seller of a business and its good will is precluded from interfering with the purchaser in the enjoyment of the particular business stand which is transferred by him to the purchaser. There is implied in the contract of sale the agreement that the purchaser will not be disturbed by the seller in his right to enjoy all advantages that inhere in the premises used as the place of business. By implication of law the contract binds the seller not to do any act that would prevent the vendee's use of the stand, and all advantages incident to it, to the same extent and in the same way the vendor himself might have done but for the sale.

Decisions which deal with interference by the seller with business locations passing without such a stipulation but as a part of the good will are no means numerous. The few, however, clearly make the distinction we have adverted to—that it does not require express terms to prevent the seller from derogating from his grant of good will incident to business premises.

Munsey v. Butterfield, 133 Mass., 492, involved a contract for the sale of a milk route. It was there said:

“A material part of the property to be delivered was, as stated in the agreement, ‘the good will of said Munsey’s milk route lying in West Somerville, East Somerville, North Somerville and Charlestown.’ This contract, called a sale of the good will of Munsey’s milk route, was really, like a sale of the good will of any business, an agreement by the plaintiff that he would retire from it, and would allow the defendant to enjoy the benefits and advantages of it, and would do nothing to impair or injure it. This agreement was implied in the transaction, and in fact constituted the contract of sale of the good will of the milk route on the part of the plaintiff.”

In *Wentzel v. Barbin*, 189 Pa., 502, 42 Atl., 44, where a paper route was sold and the vendor went over the route soliciting patronage which was formerly his, it was said:

“When the defendant agreed to sell to the plaintiff ‘all his right, title and good will to the Oakland paper route, until now controlled by the said R. M. Barbin,’ he became bound in honor and in law to carry out his contract in good faith. He was certainly not at liberty, especially after receiving a large part of the purchase money, to filch away from the plaintiff the veritable substance of that which he had sold. It was not like the setting up of another

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business of the same kind, but it was the taking away of the very thing he had sold that was complained of by the plaintiff.

The firm of Lawless Bros. was therefore under the implied obligation not to interfere with Fine as the vendee of their good will in his use of business house and control of the lease during the period and the entire period of time covered by the assigned lease. But this does not mean that they had a right to negotiate for themselves, during that time, a renewal which would be valid simply because it should take effect at the expiration of the assigned lease.

One of the incidents and advantages of the good will of the business sold to Fine, as well as of the lease transferred to him, was that of the opportunity or chance to obtain for himself, as tenant in possession, a renewal of the lease covering such future term. It is true that the original lease contained no stipulation for a privilege of renewal in favor of the tenant, and it is furthermore true that neither Lawless Bros. nor Fine had any legal right to demand of the landlord a renewal on expiration.

However, courts of equity have long been accustomed to treat the tenant in possession as having an advantage or *quasi* right, called "tenant-right," in respect of the renewal of his lease. He has an interest, less than an estate or legal right, which equity recognizes as having substance and value and which it will protect. This principle was contended for in an able argument by Sir FRANCIS HARGRAVE

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in *Lee v. Vernon*, 5 Brown's Parl. Cases (10 Ed.), 1803, which was followed by the court. He said:

"It has long been an established practice to consider those who are in possession of lands under lease . . . as having an interest beyond the subsisting term, and this interest is usually termed the tenant-right of renewal, which, though according to language and ideas strictly legal, is not any certain, or even contingent, estate, but only a chance, there being no means of compelling a renewal, yet is so adverted to in all transactions relative to leasehold property, that it influences the price in sales, and is often an inducement to accept of it in mortgages and settlements. . . .

"This 'tenant-right' of renewal, as it is termed, however imperfect or contingent in its nature, being still a thing of value, ought to be protected by courts of justice, and when those who are entitled to its incidental advantages, whether by purchase or other derivation, are disappointed of them by fraud, imposition, misrepresentation, or unfair practice of any kind it is fit and reasonable that this injury should have redress."

In *McCourt v. Singers-Bigger*, 145 Fed., 103, 76 C. C. A., 73, 7 Ann. Cas., 287, it was said:

"The likelihood of being able to secure such an extension under like circumstances is so great that it has come to be recognized as a valuable incident to the tenant's estate, a species of property which the law protects."

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The modern cases which enforce this doctrine are collated, and the principle incorporated in the text, in 16 R. C. L., p. 903.

Sometimes the same equitable end has been reached, and protection to the *quasi* right of the tenant afforded on the concept that the old lease in a sense gives birth to the new one, and that therefore the holder of the original lease has a claim to such protection by the courts.

Thus, Lord Chancellor COTTENHAM, in *Clegg v. Fishwick*, 1 Mac. & G., 294, 41 Eng. Reprint, 1278, says that:

"The old lease was the foundation of the new lease, the tenant-right of renewal arising out of the old contract giving the partners the benefit of the the new lease."

And in *Spiess v. Rosswog*, 63 How. Prac. (N. Y.), 401, affirmed 96 N. Y., 651, it was said that the so-called expectation of renewal is a part of the value of a lease. "This is deemed so actual and vital that when a new lease is had it is considered to be a graft upon the old."

Possessed as Fine was of this measure of right in the eyes of equity, has the defendant firm disregarded and invaded it so as to call for equitable intervention?

The chancellor thought not, and in his final decree so held, but expressed dissatisfaction that he could not rule to the contrary and be justified by authority. He expressed, in distinct terms, the view that Lawless

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Bros. were not "morally right in getting for themselves a renewal of the lease." The court of civil appeals in its opinion states that "it is inequitable for Lawless Bros. to retake that which they sold."

The decrees of the lower courts in dissolving the injunction originally issued and allowing that firm to take the benefits of the renewal lease and use the storehouse are based upon a misconception. The arm of equity is not too weak to reach to and remedy that which is inequitable and more—a fraud upon the rights of Fine. If precedents were lacking, the time is ripe for the making of one; but they are not lacking.

Since the expectancy or chance of renewal in favor of Fine as the holder of the current term is regarded in equity as a valuable interest, the doctrine from an early date has been that Lawless Bros., standing in at least a *quasi* fiduciary relation to him (under obligation not to interfere with him in the exercise of the "tenant-right"), may not secure for that firm and hold against him a renewal. The new lease will be treated as held in trust for Fine, as the person having the beneficial interest in the foundation lease upon which the renewal might have been grafted.

This doctrine of so holding in trust was first announced in 1670 in the case of *Holt v. Holt*, 1 Ch. Cas., 190, and it has been consistently followed both in England and in this country. 16 R. C. L., p. 904, and cases cited. Referring to the fairly analo-

gous instance of renewal of a lease by one partner for his own benefit of a lease held by his firm, it is said in this recent work:

"The lease so taken inures to the benefit of the firm, the partner taking it holding as a constructive trustee. When the lease is held by a partnership, the chance or opportunity of renewal is in itself a distinct asset of the partnership in which all the partners have an interest; and where the partnership is for a limited time it is nevertheless held that one partner has no right as against his copartner to take a new lease to commence after the expiration of the partnership by its own limitations."

As expressed in *Mitchell v. Reed*, 61 N. Y., 123, 19 Am. Rep., 252:

"The defendant was in possession as a member of the firm, and the firm *owned the good will for a renewal*, which ordinarily attaches to the possession. . . . He must hold them for the firm." (Italics ours.)

The doctrine is not confined to cases where leases are renewed by persons occupying fiduciary relations, in the strict sense. We have been cited; and our investigation has discovered, no case decided by a court of last resort in which it has been applied to a lessee who in similar circumstances has assigned for the balance of his unexpired term.

In *Bennett v. Vansyckel*, 11 N. Y. Super. Ct., 462, it was held that, where a lessee sublets with an express agreement that the sublessees should have the benefit

of the good will of the lease, a secret renewal by the original lessee (the sublessor) taken from the landlord inures to the benefit of the sublessees; and in *Crook v. Crook*, 20 Abb. N. C. (N. Y.), 249, it was ruled that, where a lessee assigned his lease to another who conducted his business on the demised premises, a renewal taken by the original lessee in his own name prior to the expiration of the lease must be held as in trust for his assignee.

It cannot be, on considerations of common honesty, that a transfer of the good will, embracing an assignment of the lease, will admit of the seller's "running under" him whose money he has taken, and ousting him of a substantial part of that which was conveyed. The chance or opportunity to procure a renewal may not be taken away from such a purchaser at any time pending the transferred term. During the whole of that term Fine's tenant-right to renew was not to be subverted by the sellers. As said in *Bennett v. Vansyckel*, supra, in speaking of the assignor:

"In respect of the good will, he was, in the full sense of the term, their (the assignee's) trustee; nor could he strip himself, without their assent, of the relation and its duties. It is true, he was not bound to take a new lease in his own name, for their benefit, but, without their consent, it was only for their benefit that he could take it all. . . . It was a breach of good faith, and of the trust and confidence which the plaintiffs reposed in him, and was therefore, according to the established doctrine of equity, a fraud, the fruits of which he cannot be permitted to retain."

Even the refusal of the landlord to renew the lease to or for the benefit of such *cestui que trust* does not, necessarily or ordinarily, entitle the assignor to take a renewal for himself.

If the rule were otherwise, ample room would be left for collusion which it might be difficult for the *cestui que trust* to expose. No such burden should be placed on the *cestui que*. It was said by Lord Chancellor KING, in *Keech v. Sandford*, Cas. T. King, 61, 15 Eng. Rul. Cas., 455:

"If a trustee, on the refusal to renew, might have a lease to himself, few trust estates would be renewed to *cestui que use*; though I do not say there is a fraud in this case, yet he should rather have let it run out than to have had the lease to himself. This may seem hard that the trustee is the only person of all mankind who might not have the lease, but it is very proper that rule should be strictly pursued and not in the least relaxed; for it is very obvious what would be the consequence of letting trustees have the lease, on refusal to renew to *cestui que use*."

Chancellor Kent, in the case of *Davoue v. Fanning*, 2 Johns. Ch. (N. Y.), 252, says of the decision in *Keech v. Sandford*, supra:

"If we go through all the cases, I doubt whether we shall find the rule and the policy of it laid down with more strictness, clearness, and good sense. This decision has never been questioned."

Both cases, *Keech v. Sandford* and *Davoue v. Fanning*, were cited with approval by this court in *Neal v. Cox*, Peck (7 Tenn.), 443.

The lower courts were in error, therefore, in holding that since the landlord, Mrs. Strong, could not be restrained or prevented from renewing the lease to Lawless Bros., by reason of that fact or by parity of reasoning the latter could hold under it for themselves and as against their vendee and assignee. This is a *non sequitur*.

The fact that both of the leases contained a provision that they should "not be assigned or transferred by the lessees or by operation of law without the written consent of the owner" cannot operate to affect the right of Fine to have Lawless Bros. decreed to hold the demised premises in trust. The trust relationship is forced on the firm from considerations of public policy—to prevent persons in like situations from taking a benefit for themselves to the detriment of others to whom they are pledged not to do so. *Mitchell v. Reed*, supra. The quoted provision was meant to safeguard the right of the landlord. That right is a thing wholly distinct from the disability or liability of Lawless Bros.

As already indicated, we are of opinion and hold, with both of the lower courts, that Fine may not through the medium of the trust relationship thrust by law on Lawless Bros., or of any assignment by that firm of its rights in the renewal, compelled by equity, force himself as tenant for the new term on Mrs. Strong. Her volition and her discretion as to the selection of a tenant, in view of the above stipulation in her contract, are not to be denied or overridden,

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further than is involved in the disqualification of Lawless Bros. to enjoy the fruits of their grossly inequitable conduct.

It appears that prior to the filing of the bill of complaint Mrs. Strong had brought a suit before a justice of the peace against Fine to dispossess him. That suit was enjoined. It is contended by Fine that the injunction should be perpetuated, the position advanced being that she was without *status* to maintain an action of unlawful detainer after she executed the lease in reversion, covering the new term, to Lawless Bros. A lease in reversion is one which becomes effective only at the expiration of the term of the prior lease. The authorities in other jurisdictions are not in accord on the point whether, notwithstanding the execution of a second lease, the landlord remains clothed with such a right to the possession of the premises as that she may maintain a proceeding against the first tenant who refuses to surrender. The conflicting authorities are collected in notes 120 Am. St. Rep., 36, and L. R. A., 1915C, 199. The rule independent of any statute making special provision to the contrary appears by the weight of authority to be that, generally, the proceeding to dispossess may be maintained by the original landlord, on the theory that the lessee under a lease in reversion has no interest to that end until he gets possession; the duty remaining the landlord's to place his second lessee in possession. For the purpose of discharging the duty he may maintain a proceeding to dispossess the original tenant.

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This court has not ruled the point, but the above view was indicated to be the true one in *McNairy v. Hicks*, 3 Baxt. (62 Tenn.), 378, if the first tenant is holding under a claim of right. The intimation in *Marley v. Rodgers*, 5 Yerg. (13 Tenn.), 217, is in favor of the landlord's right of action. We agree with the lower courts in holding that Mrs. Strong had the right to maintain the action of unlawful detainer under Thompson-Shannon Code, section 5093.

The legal attitude of Lawless Bros. in this case—disqualification to take as against or to dispossess Fine—is itself a potent argument in favor of this right being yet in the landlord.

We do not find it necessary to discuss other assignments of error. The material rulings of the court of civil appeals, except as above modified, are affirmed. A decree will pass accordingly; but should Mrs. Strong deem it proper, in view of Fine's claim to consideration at her hands, to yet insist upon her legal remedy to dispossess, her right to have a writ to that end will be stayed for ninety days following entry of final decree herein. The injunction against Lawless Bros. will be made perpetual, and they will pay all costs of the cause.

J. A. CASH v. CASEY-HEDGES Co. *et al.*

(*Knoxville*. September Term, 1917.)

1. **MUNICIPAL CORPORATIONS.** Liability for torts of independent contractor.

A municipality was not liable for death caused by fall of a smokestack being erected under contract, where such erection was not necessarily dangerous when done with care by persons having skill, and the municipality did not know the contractor was incompetent and did not control the methods or appliances of the contractor in performing the work. (*Post*, pp. 184, 185.)

Cases cited and approved: *McHarge v. Newcomer*, 117 Tenn., 595; *Davis v. Lumber Co.*, 126 Tenn., 576; *Powell v. Construction Co.*, 88 Tenn., 692.

2. **NEGLIGENCE.** Duty to warn.

Where, in the erection of a heavy smokestack by a gin pole and ropes and pulleys, there was danger of its falling, the erector was bound to warn every person near enough to be struck in case it fell. (*Post*, p. 185.)

3. **NEGLIGENCE.** Discovered peril. Contributory negligence.

Contributory negligence of a workman in working in a place apparently dangerous because near a heavy smokestack being erected in such manner that there was danger of its falling did not relieve the erector from liability for death of the workman by fall of the smokestack, where, knowing the workman's position, the erector proceeded with the work, constantly increasing the workman's peril; such conduct by the erector being willfulness or wantonness. (*Post*, pp. 185-188.)

Cases cited and approved: *Railroad v. Williford*, 115 Tenn., 122; *Whirley v. Whiteman*, 38 Tenn., 619; *Ga. Pacific R. Co. v. Lee*, 9 So., 233; *Westborne Coal Co. v. Willoughby*, 133 Tenn., 257; *Todd v. Railroad*, 135 Tenn., 92.

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4. MASTER AND SERVANT. Safe place to work. Assurance of foreman.

Where the employee of one contractor, apprehensive of danger of falling of smokestack being erected by another contractor near his place of work, continued at work on being told by his foreman that it was safe, his employer was liable for the workman's death by smokestack's falling, notwithstanding the accident was primarily due to negligence of a third party, over whom the employer had no control; the workman having the right to rely on the foreman's statement as an assurance that his employer had furnished him a safe place to work. (*Post*, pp. 188-203.)

Cases cited and approved: *Railroad v. Hayes*, 117 Tenn., 680; *C. & I. R. R. v. Russell*, 91 Ill., 298; *Erslew v. Railroad et al.*, 49 La. Ann. 86; *Chattanooga v. Powell*, 133 Tenn., 137; *Channon v. Sanford Co.*, 70 Conn., 573; *McGuire v. Bell Tel. Co.*, 167 N. Y., 208; *Lindgren v. Williams, etc., Co.*, 112 Minn., 186; *Clark v. Union Iron & F. Co.*, 234 Mo., 436; *Foster v. Walker Roofing Co.*, 139 Ga., 431; *Wilson v. Valley Improvement Co.*, 69 W. Va., 778; *Riley v. Tucker*, 179 Mass., 190.

Cases cited and distinguished: *Clark v. Union Foundry Co., et al.*, 234 Mo., 451; *Griffith & Sons Co. v. Brooks*, 197 Fed., 723; *Raxworthy v. Heisen*, 274 Ill., 398; *Hughes v. Malden, etc., Co.*, 168 Mass., 395.

FROM LOUDON.

Appeal from the Circuit Court of Loudon County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Sepreme Court.—
SAM C. BROWN, Judge.

PENLAND & OGLE and J. E. CASSADY, for Cash.

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BREAZEALE & BREAZEALE and WEBB & BAKER, for Lenoir City.

SIZER, CHAMBLISS & CHAMBLISS, for Casey-Hedges Co.

CHAS. H. SMITH and CHAS. T. CATES, JR., for J. B. McCrary Co.

MR. JUSTICE FENTRESS delivered the opinion of the Court.

This action was brought by the administrator of G. W. Cash, who was fatally injured by the fall of a smokestack, against Casey-Hedges Company, J. B. McCrary Company, and the town of Lenoir City, to recover damages for the alleged negligent killing of the intestate. At the close of the plaintiff's evidence the trial judge directed the jury to find a verdict for all the defendants, and the plaintiff appealed to the court of civil appeals, where that judgment was affirmed as to Lenoir City, and reversed as to the other defendants.

The town of Lenoir City contemplated the erection of a water and sewerage system, and employed the J. B. McCrary Company to act as engineers and to superintend the construction of same for which it was to have been paid a percentage of the cost. The municipality also entered into a contract with the Casey-Hedges Company, whereby the latter agreed to furnish and erect for it two boilers

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and a smokestack. After the work had progressed to some extent, the contract between Lenoir City and McCrary Company was changed so that the latter undertook to complete the then unfinished portion of the improvements. However, the McCrary Company did not, in any respect, control the manner in which the Casey-Hedges Company did its part of the work.

On the day he was killed, the deceased was employed as a brick mason by the McCrary Company, under its foreman Wilson, in building a wall around the two boilers which had theretofore been erected by the Casey-Hedges Company. At about twenty-five feet from the place where Cash was laying brick, the Casey-Hedges Company, through its foreman Hannah and his laborers, was endeavoring to erect, upon a foundation constructed for the purpose, a smokestack sixty feet long and four feet in diameter, the weight of which was approximately 4,000 pounds.

At the time of the accident, Hannah and his men were elevating the smokestack to a vertical position, by means of what is called in the record, a "gin pole," to which was attached a pulley, through which ran a rope, and at the end of the rope there was an iron or steel hook. A rope had been tied around the stack, and to this rope the hook was attached, and it was proposed to lift the smokestack from the ground by pulling upon these ropes. It is stated in the record that by reason of the fact that the gin pole was too short, it was necessary to place the rope, which went

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around the stack, between the middle and the lower end of the stack. In order to keep the upper end of the stack from overbalancing the lower end, the center of gravity being below the middle of the stack, iron doors and beams, weighing about 1,000 pounds, were attached to the lower end of the stack, making its entire weight, with attachments, about 5,000 pounds.

Cash was employed that morning one hour and twenty minutes before the accident occurred which resulted in his death. When he went to the place to go to work, one end of the smokestack was on the ground and the other was on an elevation ten or twelve feet high. He observed what was contemplated to be done, and remarked to one Long, another bricklayer, that it looked "a little risky." "I reckon they know their business or we would not be here working." The proof shows that perhaps an hour after this, Hannah, the foreman of Casey-Hedges Company, in speaking to his crew, said: "Look out, boys; there is no telling what might happen." The record does not show that Cash heard this warning, nor does it appear that Hannah notified him otherwise of the danger. However, about twenty minutes before the stack fell, and perhaps when most of the weight of the stack was upon the equipment, Cash became apprehensive, and stated to Wilson, the foreman of his employer, that he thought what was being done was dangerous. Evidently the situation justified apprehension, as one of the witnesses in the record testified that he had gone to the place for the purpose

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of obtaining employment, but, when he saw the situation, he did not ask for a job, because he thought the place was dangerous. In response to the statement of Cash that he thought what was being done was dangerous, Wilson replied that it was safe, and thereupon Cash resumed his work.

About twenty minutes after this conversation occurred the stack fell, inflicting injuries upon Cash, from which he died. The fall was caused by the breaking of the hook. An inspection of the hook, after the fall, showed that there was an old defect in it. It is improbable, however, that it would have held the weight put upon it if it had not been defective, as one of the witnesses, having some knowledge of such matters, testified that it was one inch in diameter, and that the capacity of such hooks was 2,000 pounds.

The plaintiff has filed a petition for *certiorari*, and assigns error to the action of the court of civil appeals in affirming the judgment as to Lenoir City; and J. B. McCrary Company and Casey-Hedges Company have likewise filed petitions for *certiorari*, and assigned error to the action of the court of civil appeals in reversing the judgment of the circuit court. All of the petitions were granted, and the case was argued in this court.

As to Lenoir City, we think the suit should have been dismissed.

We cannot say that the erection of smokestacks, similar to the one in this case, is necessarily dangerous, when done with care by persons who have skill

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in such matters, and the record does not show that the municipality knew Casey-Hedges Company was incompetent, or that it controlled the methods or appliances adopted by the latter in performing the work. *McHarge v. Newcomer*, 117 Tenn., 595, 100 S. W., 700, 9 L. R. A. (N. S.), 298; *Davis v. Lumber Co.*, 126 Tenn., 576, 150 S. W., 545; *Powell v. Construction Co.*, 88 Tenn., 692, 13 S. W., 691, 17 Am. St. Rep., 925.

As to Casey-Hedges Company it is quite plain that it was under the duty of warning every person sufficiently near to the stack to be struck in the event it fell. In 29 Cyc., 474, it is said:

“Where one is performing some act which is likely to be dangerous to persons in the vicinity, it is his duty to warn such persons of the danger;” furthermore, the “notice must be sufficient to apprise the persons notified of the danger.”

The danger of the collapse of the stack increased as it was elevated. The fact that Hannah, the foreman of this defendant, told his crew to be on the lookout, as he did not know what might happen, shows that he feared the smokestack might fall. He knew that Cash was engaged in laying brick and not in a position to observe what was being done.

If it be admitted that the deceased was guilty of contributory negligence in working in a position which had the appearance of danger, still this will not excuse the defendant from liability where it constantly increased his peril, knowing that the deceased did not appreciate the danger and was not in a position

to avert the accident and its consequent injury. Such conduct is mildly characterized as gross negligence; it is rather willfulness or wantonness. What was said by this court in *Railroad v. Roe*, 118 Tenn., 611, 102 S. W., 343, is so apt here that we quote at some length from the opinion:

“In *Railroad v. Pugh*, 97 Tenn., 627, 37 S. W., 555, this was said: ‘The rule at common law and in this State still is that any contribution to any injury which directly produced it would bar the action in any case where statutory provisions to the contrary do not apply.’ . . .

“This rule is entirely consistent with that other, under which a party will not be ‘excused from liability for an injury which he inflicts on another on the ground of the earlier negligence of the latter, when, aware of the latter’s exposure to peril, he omits ordinary and reasonable care to avoid the injury. When the observance of this care would have prevented the hurt, failure in that regard is actionable wrong. It is so, not only because such negligence is the proximate occasion to the injury, but for the stronger reason that it indicates wantonness, and for this the law affords no excuse.’ *Railroad v. Williford*, supra [115 Tenn., 122, 88 S. W., 178;] *Whirley v. Whiteman*, supra [1 Head, 619]. In the first one of the cases last cited this court quoted with approval from an opinion of the supreme court of Alabama, in *Ga. Pacific R. Co. v. Lee*, 9 South., 233, 92 Ala., 270, as to the failure of a defendant to make an effort to avoid

an injury which he sees is imminent to the party who has been guilty of some negligence in placing himself in a perilous position, as follows: 'Such failure, with such knowledge of the situation and the probable consequences, and omission to act upon the dictates of prudence and diligence to the end of neutralizing plaintiff's fault and avoiding disaster, notwithstanding his lack of care, is, strictly speaking, not negligence at all; but it is more that any degree of negligence, inattention, or inadvertence. It is that recklessness or wantonness, or worse, which implies willingness to inflict the impending injury, or willfulness in pursuing a course of conduct which will naturally or probably result in disaster, or an intent to perpetrate a wrong.'

"Judge COOLEY, in the work already referred to, at page 674, on this point says: 'Where the conduct of the defendant is wanton and willful, or where it indicates that degree of indifference to the rights of others which may justly be characterized as recklessness, the doctrine of contributory negligence has no place whatever, and the defendant is responsible for the injury he inflicts, irrespective of the fault which placed the plaintiff in the way of injury. The fact that one has put himself in a place of danger is never an excuse for another's purposely or recklessly injuring him. Even the criminal is not out of the protection of the law, and is not to be struck down with impunity by persons. If, therefore, the defendant discovered the negligence of the plaintiff in time by the use of

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ordinary care to prevent the injury, and did not make use of such care for the purpose, he is justly chargeable with reckless injury, and cannot rely upon the negligence of the plaintiff as a protestation.'''

See *Westborne Coal Co. v. Willoughby*, 133 Tenn., 257, 180 S. W., 322; *Todd v. Railroad*, 135 Tenn., 92, 185 S. W., 62, L. R. A., 1916E, 555; *Railroad v. Williford*, 115 Tenn., 122, 88 S. W., 178.

We are of the opinion that the McCrary Company is liable for having failed to furnish its servant a safe place in which to work, notwithstanding the fact that the accident was due primarily to the negligence of a third party over whom it did not have control.

In *Labatt on Master and Servant* (2 Ed.), section 1028, it is said:

“Where the abnormal conditions which caused the injury are shown to have been originally produced by a cause for which the master was not responsible, the action is or is not maintainable, according as it may appear that he was or was not guilty of a subsequent and distinct breach of duty in having failed to ascertain the existence of these conditions, or in having omitted, after discovering them, to take such steps as might be appropriate for the protection of his servants. This principle is applicable where the abnormal conditions resulted from the act of a stranger.”

This rule is illustrated by the case of *Railroad v. Hayes*, 117 Tenn., 680, 99 S. W., 362. The plaintiff was a brakeman in the service of the railroad, and

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while riding on the ladder of a box car was injured by a chute which had been placed too near the track by a third party. It did not appear the defendant knew of the obstruction before the accident, or was negligent in not making inquiry. This court held the railroad was not liable.

In *C. & I. R. R. v. Russell*, 91 Ill., 298, 33 Am. Rep., 54, the defendant was held liable for injuries received by a brakeman who was knocked from the ladder of a box car by a telegraph pole which had been erected by a third party too near the track; it appearing the railroad knew the pole was too near the track.

In *Erslew v. Railroad et al.*, 49 La. Ann., 86, 21 South., 153, the railroad was held liable for the death of a brakeman who was knocked from the top of a box car of more than ordinary height by the wire of a trolley line stretched across the track. It was shown that the defendant knew that the wire was too low to clear a man on a high car.

We think Wilson, the foreman of McCrary Company, was culpable in telling the deceased that what was being done by Casey-Hedges Company was safe and that Cash had the right to rely upon this statement as an assurance that his employer had complied with his duty to furnish him a safe place in which to work.

In *Chattanooga v. Powell*, 133 Tenn., 137, 179 S. W., 808, this court held that where a servant became apprehensive of danger and was assured by his master that the place where he was working was safe, such

assurance was equivalent to a statement to the servant that the master has knowledge of the matter superior to that of the servant, and that the latter could rely upon the information given, unless the danger is so glaring that a man of ordinary prudence would not have continued to work.

It is insisted, however, that in *Chattanooga v. Powell*, the plaintiff was an ignorant laborer and the foreman was a man of experience, and that the right of the servant to rely upon the master's assurance of safety is based upon the latter's supposed superior knowledge. Furthermore, it is contended that Wilson was not presumed to have knowledge, superior to that of the deceased, about the competency of the employees of a third party and the sufficiency of the devices used by it, and that in assuring the deceased that what was being done by employees of Casey-Hedges Company was safe, Wilson exceeded the scope of his authority, and therefore did not bind his master. There is much force in this argument, but we cannot assent to a rule which would absolve the master from liability for injuries to his servant due to the negligence of a third party, which negligence would not have caused injury to the servant, but for the negligence of the master in failing to perform a duty he owed to his servant. Such a situation presents a case of concurrent negligence.

Wilson told Cash that what was being done was safe, yet the appearance of danger was sufficient to arouse apprehension. It is not shown that he made

inquiry as to the likelihood of the collapse of the stack and rigging or an inspection of the latter, with the view of ascertaining its adequacy to the strain put upon it. It was manifest that the deceased could not be on the lookout while performing his duties, and that he would likely be crushed if the stack fell.

In *Clark v. Union Foundry Co. et al.*, 234 Mo., 451, 137 S. W., 577, 45 L. R. A. (N. S.), 295, the electric street railway company in St. Louis contracted with Stuart & Co. to make certain improvements near its power plant. A contract for erecting a coal chute was sublet to the Union Iron Foundry Company, of which plaintiff Clark was an employee. In order to construct the chute it became necessary to erect a gin pole, and for that purpose the plaintiff was directed by his foreman to ascend a pole of the street railway company to which were attached cross-arms, upon which were defectively insulated feed wires. Plaintiff ascended the pole, and, without notice from the street railway company of the danger, was in the act of pulling a rope over the wires when he was shocked and sustained serious personal injuries. He did not know that the insulation was not sufficient to protect him. The foreman who directed him to do what he did was also ignorant of the fact that the insulation was insufficient. In a suit against his employer to recover for his injuries, the plaintiff obtained a judgment. The contention was made that as "the pole and wires were not on the premises where appellant was required to work, the respondent had no authority

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or control over the same, and consequently had no right to go upon the pole and wires for the purpose of making an inspection of them." The court said:

"This contention in our opinion, is unsound, for the reason that the dangers which make the place where the servant is required to work unsafe need not constitute a part and parcel of the place itself, but the danger may, as is often the case, be separate and independent of the place itself, yet so near thereto as to make it reasonably certain that persons while working there are liable to come in contact with said nearby danger and be injured thereby. The test is not that the place of itself is reasonably safe, but it must be reasonably safe from all internal and external dangers which are liable to do injury to the servant. It might be that the building, for instance, in which the servant is required to work, is unusually strong and has no inherent defects or dangers whatever, yet who would for one moment contend that the same building would be a reasonably safe place for people to work if on the adjoining lot there stood a much larger and taller building, so weakened by storm or fire that it was on the very verge of falling on the smaller."

In *Griffith & Sons Co. v. Brooks*, 197 Fed., 723, 117 C. C. A., 117, the plaintiff was employed to work in a building partially destroyed by fire. His master employed one Bishop, an independent contractor, to take down a portion of the walls. For this purpose Bishop installed a derrick upon the roof of an adjoining

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building. The derrick fell, causing the walls to collapse and injure the plaintiff. An inspection showed that the derrick was defective and not of sufficient strength to do the work which was attempted to be done with it.

In a suit against the master for injuries sustained by the plaintiff the court held the defendant was liable, and, in the opinion, said:

“In the view we take of the case, it is not important what the precise legal relations were that existed between Bishop and the company. The company caused the derrick to be brought there as one of the instrumentalities needed in the performance of its contract to restore the building. The company knew that the derrick stood on the west edge of the building next east of the injured buildings, and that the use of the derrick involved the swinging of the boom with its loads over them. It is manifest that, unless the derrick was securely fastened, such use of it was a menace to persons working within these fragments of buildings. In these circumstances and conditions, the company was carrying on the work within these fragments. As it seems to us, this case is not wholly conceived or stated when it is said that the effect of the relations between Bishop and the company was, as regards the installing and use of the derrick, to absolve the company from all responsibility to the plaintiffs. The controlling question is whether the company can escape the general rule that it is the master's duty to exercise due care to provide for his

servants a reasonably safe place in which to work. This rule is founded upon the master's possession and control of the premises in which he puts his servants at work."

In *Raxworthy v. Heisen*, 274 Ill., 398, 113 N. E., 699, it appeared that Raxworthy was employed by the defendant as a stonecutter. An independent contractor also employed by defendant, operated an elevator for the purpose of hoisting and placing stone in the building under construction. Raxworthy was directed to work near the elevator, and it fell and killed him. The proof showed that the wire cables suspending the elevator were rusty and defective and of insufficient strength to lift the loads put upon it.

In a suit by the administrator of the deceased the defendant was held liable. The court said:

"The question then presented is whether plaintiff in error owed his own servants the duty of using reasonable care to see that Shand, as an independent contractor, did not, by the negligent use of defective appliances in the performance of his work, make unsafe or dangerous the place where plaintiff in error's servants were required to work. . . . The plaintiff in error should have either required the defect remedied, or have moved deceased to a place to work where he would not have been exposed to the danger. An injury to plaintiff in error's employee as the result of the use of a defective cable might have been anticipated as probable, and that the master should be held liable in such case seems to us reasonable

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and just. If the injury could not have been anticipated as the probable result of the use of the defective cables, a different rule would apply."

In the last two cases the master may be said to have brought his servant and the independent contractor together, as he employed both of them to work at the same place; but this fact did not make him liable. Liability in both cases was predicated upon the master's breach of duty to his servant in failing to furnish him a safe place in which to work, and not upon the theory that he was liable for the negligence of the independent contractor.

The judgment of the court of civil appeals is affirmed.

LANSDEN, J., dissents as to the judgment dismissing the suit as to Lenoir City.

WILLIAMS, J., dissents from the judgment as to the J. B. McCrary Company.

WILLIAMS, J. (dissenting in part). My dissent is based upon the application of a doctrine, sound in many instances where injury is occasioned by the nearby operation of an independent contractor's equipment, to this case, where it appears that McCrary company had nothing to do with the selection, employment, or bringing to the premises of the Casey-Hedges Company. We have here two independent subcontractors under the town of Lenoir City. We have, then, the legal equivalent of the

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McCrary Company being at work in the vicinity of a third party.

Labatt on Master and Servant, section 1069, states the true rule, which in my judgment should be applied to the facts of the pending case:

“An action cannot be maintained for injuries caused by the negligence of servants of the owner of premises adjoining those of the defendant, at all events, in the absence of evidence showing that the particular event which produced the injury ought to have been foreseen by him.”

The approximation to consociation of the two crews not having been brought about by the McCrary Company, that company had a right to presume that the work of Casey-Hedges Company would be conducted in a skillful and safe manner.

“Where an employer’s own servants are required, in the course of his business, to work in combination with other parties for the performance of something in which he and those parties have a common interest, it is not negligent for him to act on the presumption that they will exercise proper care.”
3 Labatt, Mas. & Ser., section 929.

A fortiori, should this be true where the work is not in combination or in a common interest. A denial of the presumption and the imposition of a duty to inspect would in “the discharge of that duty take an employer widely beyond the scope of his business territorially as well as otherwise.”

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McCrary Company was not put to the employment of a foreman who was skilled in matters, such as the tensile strength of iron (the hook which broke), or in the intricacies or the hazards which were incident to the work of the Casey-Hedges Company.

Wilson as well as Cash did not hear the warning statement that Hannah addressed to the Casey-Hedges crew. He and his employer had no right to inspect the latter company's equipment, or to direct its time, place, or mode of work; nor was he held out by the McCrary Company as fit for such service.

So far as the proof shows, Wilson did not know of the crack in the hook, and did not promise to look out for and give warning to Cash, and what he said by way of assurance (not having back of him the right to inspect) was personal, and not official, so as to bind the McCrary Company. A vice principal must, to that end, be supposed to have knowledge, or from his position be chargeable with special knowledge, as to whether the place was safe. If Cash and Wilson were on a parity in the particular respect, a recovery cannot be awarded on account of the assurance. *Grey Eagle Marble Co. v. Perry*, 138 Tenn., 231, 197 S. W., 674. Cash had no right to infer that Wilson had made, or had power to make, an inspection of the equipment not under the McCrary Company's control.

In the last analysis, the case must turn upon the ability and legal duty of Wilson to leave his own job and go outside of his own designated sphere, fore-

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man of bricklaying, and pass judgment on another and wholly distinct contractor's work.

The duty of the master to provide a reasonably safe place for the servant to work in is not absolute, and is not, ordinarily, applicable where the master neither has nor assumes possession, use, or control of the premises of a third person, or of that which tends to make the place unsafe. *Channon v. Sanford Co.*, 70 Conn., 573, 40 Atl., 462, 41 L. R. A., 200, 66 Am. St. Rep., 133; *McGuire v. Bell Tel. Co.*, 167 N. Y., 208, 60 N. E., 433, 52 L. R. A., 437; 18 R. C. L., 585. JAGGARD, J., in *Lindgren v. Williams, etc., Co.*, 112 Minn., 186, 127 N. W., 626, collects the cases, and says that the rule of non-liability has received general sanction.

The case of *Clark v. Union Iron & F. Co.*, 234 Mo., 436, 137 S. W., 577, 45 L. R. A. (N. S.), 295, is not so far an exception to this general rule as to be in point, as the majority conceives, for there the injured employee was ordered to go to and make use of the very spot where a highly dangerous agency was in existence, without any examination to see whether the electric wires were insulated; and the employee was shocked in a direct contact with that agency. In the annotation of the case (45 L. R. A. [N. S.], 297) it is demonstrated and stated that it is necessary to show that the injury was one which might have been anticipated by the master; and it appears that the Union Iron Company had such temporary control of the immediate place as that the duty to inspect

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arose. The opinion is grounded on the existence of that duty.

That decision, even on its own facts, is directly opposed by *Foster v. Walker Roofing Co.*, 139 Ga., 431, 77 S. E., 581, and, if not distinguishable and justified by the fact that the wires were or might be supposed to be highly dangerous, is opposed by a long line of cases collated in the decision and note in *Wilson v. Valley Improvement Co.*, 69 W. Va., 778, 73 S. E., 64, 45 L. R. A. (N. S.), 271, Ann. Cas., 1913B, 791, where it is demonstrated that there is no duty to inspect, in case of ordinary appliances, premises or work of third persons.

In *Hughes v. Malden, etc., Co.*, 168 Mass., 395, 47 N. E., 125, Judge HOLMES said, speaking of the right of plaintiff in fairly similar circumstances to rely upon his master to provide a safe place:

“As was manifest, and as the plaintiff must be taken to have known, the defendant had no control over the trench. He had a right to expect that, if the defendant knew of any danger which the plaintiff did not know and ought not to be assumed to know, it would inform him. But no such knowledge on the part of the defendant was shown. It does not appear to have known anything except what was visible to the eye, or to have been able or bound to infer from what was visible anything which the plaintiff with his experience was not equally able to infer. What more could it have done?”

Passing to a suggestion of a duty to inspect, it was said, fully answering the majority opinion on the same point:

“The only thing which we think of as possible is that the defendant might have inquired how long the ditch had been dug, as bearing on the chance of a fall, and then have told the plaintiff. But it seems to us that it would be more straightforward to require the defendant to insure the plaintiff than to allow a recovery to be based upon the omission of such an inquiry as an excuse for a verdict.”

See, also, *Riley v. Tucker*, 179 Mass., 190, 60 N. E., 484.

Speaking to the feature of assurance of safety given in such circumstances, it was said in *Channon v. Sanford Co.*, *supra*:

“The question, on this part of the case, is whether, if no such duty rested on defendant by law, the facts found warrant the conclusion, as matter of law that it assumed such a duty. The strongest thing in the finding in favor of such a conclusion is the fact that the defendant assured the plaintiff that the staging would be entirely safe; but this fact, taken either alone or with the other facts found, clearly does not warrant any such conclusion as matter of law.”

Lenoir City escapes liability because the work to be done was not inherently dangerous; and I think the McCrary Company ought not to respond if Wilson, in reliance on due care and skill on the part of Hannah and of the latter's employer, assumed

and gave assurance; in effect, that in his opinion they knew what they were doing. Cash himself but a few moments before had ventured his opinion to a co-laborer to the same effect.

The rule to be adopted may have a wide application. This is the only justification for so full a statement of the grounds of dissent. In the construction of large buildings and in great public works, not merely two but several such independent crews must work in proximity. Can it be said where a steel building is in process of erection, and heavy steel is being lifted by intricate hoisting devices, by one employer, that a plumber who sends to work below his roughing-in force of three laborers with one of them in charge as boss, entirely competent to the simple task, must answer for that boss' opinion and assurance to one of his crew that there is no danger to be expected from the equipment or methods of the steel contractor engaged at work above? To say that, being ignorant, his duty is to withdraw his crew means that the two jobs cannot be carried forward at the same time, when as a practical problem they must be. The imposition of duty in that regard should be based on knowledge, actual or implied, not ignorance. It is unreasonable to impose on a contractor the duty of employing a foreman who is capable of gauging the operations of other contractors who use more intricate apparatus; and the majority view will so result, as I construe it.

In *McGuire v. Bell Tel. Co.*, supra, Chief Justice PARKER in referring to such distinct subcontractors, said:

"But if the respondent's contention be sound, the person engaged by the owner to do the plumbing would, under the rule requiring the master to use reasonable and ordinary care to provide a safe place for his workmen, be charged with the duty of inspection to see whether the [other] contractor had properly constructed the foundation, and hence chargeable in damages for injuries sustained by his men because of the fall of the building. No one has as yet presented such a claim to the court; but, if this charge is to stand as a correct exposition of the law, such claims will be presented in the future; for in the vast and varied work of construction, in which many independent contractors are engaged, each will naturally, and in fact must necessarily, rely upon the caution and care of others to guard against destruction of property and of life."

Hannah thought that even members of his own crew, who presumably were somewhat acquainted with the details of the work, needed to be advised of the risk. Unless or until Wilson was so warned, we ought not to impute to him knowledge, there being no proof that he in point of fact apprehended or appreciated the danger. One of plaintiff's witnesses says:

"You could not tell by looking at the rope, hook, and other appliances which they were using whether the place was safe or not."

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It is further shown that Wilson as a part of the conversation stated that he thought it was not dangerous, saying "that is a brand new rope." He thus indicated clearly what his opinion was based on; and the rope stood the strain.

In my opinion the real and sole liability should fall on the Casey-Hedges Company because of the use by it of the cracked and defective hook.

F. D. HART, JR., *et al.* v. APPALACHIAN WASHED COAL
COMPANY *et al.*

(Knoxville. September Term, 1917.)

1. **FIXTURES.** Landlord and tenant. Conditional seller. Right of removal. Trade fixture.

A company sold machinery to a lessee, retaining title. The machinery was placed on the leased premises in a sheet iron building, and on a concrete foundation, to which it was bolted by nine bolts, imbedded in the concrete, run through prepared holes and confined by nuts. The machinery could be removed from the building at an expense of not more than \$5, but the door of the building was too small to pass the machinery. The removal of two sheets from the side of the building would not materially impair it, as they could be replaced at a trifling cost. The lessee made rents and royalties a lien on the leasehold, fixtures, and improvements, and the lessor retained a lien on future acquired property brought on the premises. *Held*, that if the machinery was a fixture, it was a "trade fixture," so that the seller's right to take possession of and remove the machinery was superior to that of the lessor. (*Post*, pp. 208-210.)

2. **LANDLORD AND TENANT.** Landlord's lien. Subsequently acquired property.

A clause, retaining a lien on future acquired property brought on the premises, was good as between the lessor and lessee, regardless of whether the property became a fixture. (*Post*, pp. 208-210.)

Cases cited and approved: *Cubbins v. Ayres*, 72 Tenn., 329; *McDavid v. Wood*, 52 Tenn., 95; *Saunders v. Stallings, Id.*, 65; *McClung v. Carriage & Wagon Co.*, 117 Tenn., 250; *Union Bank v. Wolf*, 114 Tenn., 255.

*The question of right, as between landlord and tenant, to remove trade fixtures, conditional upon their susceptibility to removal without injury to themselves is discussed in note in 18 L. R. A. (N. S.), 423.

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FROM CLAIBORNE.

Appeal from the Chancery Court of Claiborne County.—HUGH G. KYLE, Chancellor.

MONTGOMERY & MONTGOMERY, for American Ass'n.

J. H. S. MORISON, for General Creditors.

JOHN M. THORNBURG and N. R. PATTERSON, for Goodman Mfg. Co.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

The question for disposition arises on the intervening petition of Goodman Manufacturing Company in a general creditors' proceeding filed in the chancery court of Claiborne county. The facts necessary to raise the points of law to be determined are these:

On the 1st day of May, 1907, the American Association, Incorporated, leased to the Nicholson Coal Company a coal mine in Claiborne county. Section 5 of the lease reads:

"The lessee further covenants and agrees that all rents and royalties herein agreed to be paid shall be deemed and considered as created for the rent of land, and shall be a lien on this leasehold and the fixtures and improvements thereon, and on the personal property of the lessee, and on the coal

mined from and coke made on said premises for twelve months after said rents and royalties fall due, and until the termination of any suit commenced within that time for said rents and royalties."

Section 22:

"The lessee further covenants and agrees at the expiration of this lease to leave and surrender to the lessor the premises herein demised, with the improvements, fixtures, buildings and dwellings thereon, and with all of the mines, entries, openings, tramways, inclines, chutes, tracks, rails, and appurtenances inside and outside of the mines in good working order and condition (but on such termination the working tools and instruments used in mining, machinery, engines, boilers, pumps, ropes, and weighing scales and other personal property placed upon said premises by the lessee shall be and remain the property of lessee, and may be removed by the lessee in case all rents and royalties be paid and agreements of this lease fully complied with): Provided, however, the lessee covenants and agrees that the lessor shall have the right and preference to purchase, at an appraisal of fair market value, all or any of the machinery and other personal property of the lessee above allowed to be removed, should the lessor desire to do so at the expiration or sooner termination of this lease in lieu of allowing removal."

On the 23d of January, 1911, nearly four years after the execution of the lease, the Goodman Manufacturing Company sold to Nicholson Coal Company, which

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was the predecessor in title and interest of the Appalachian Washed Coal Company, the machinery involved in the present litigation, consisting of one 16x16 McEwen center crank engine and one 100 K. W. Thompson Ryan Generator, for which the coal company agreed to pay \$4,419.34, and there is still a balance due, the amount of which is not contested. At the time the machinery was furnished, there was a contract in writing retaining title until the debt should be paid. The machinery was placed on the leased premises in a sheet iron building, and on a concrete foundation constructed therein, to which it was bolted by nine bolts. It was not embedded in the concrete, but the bolts were so embedded, and they were run through prepared holes, and the machinery was then confined to the bolts by nuts. The evidence shows that it can be removed from the building at an expense of not more than \$5; it being necessary only to unscrew the nuts, detach the machinery from the bolts, and remove two sections of the sheet iron wall or siding, the door of the building being too small to pass the machinery. The removal of the two sheets from the side of the building would not materially impair it, as they could be replaced at a trifling cost.

The Goodman Manufacturing Company filed its intervening petition alleging the maturity of the purchase-money debt and the failure to pay, and sought the chancellor's permission to take possession of the machinery and remove it. The lessor filed an answer relying on the lease contract, and claim-

ing its lien by virtue thereof, as prior and superior to the claims of the Goodman Manufacturing Company. The general creditors also filed an answer contesting the right of removal. The evidence shows that at the time these proceedings were begun there was a balance of more than \$3,000 due the lessor for unpaid royalties. Pending this litigation the royalties have increased so that they now reach a total of about \$14,000. In no event can there be realized out of the property here involved anything for the general creditors; so the question rests wholly between the lessor and the Goodman Manufacturing Company. The chancellor decided in favor of the lessor's contention, and thereupon the Goodman Manufacturing Company appealed to the court of civil appeals. That court reversed the chancellor. The case is now before us for determination.

The question has been much debated as to whether the machinery constituted a fixture, and, if so, whether it could be lawfully removed. On this subject it is sufficient to say that if a fixture at all, it was a trade fixture, and hence, as between lessor and lessee, nothing else appearing, removable by the latter; the rule being very liberal towards the lessee's right of removal when it does not appear that such action is contrary to any prevailing usage or that it would cause any material injury to the estate, and it appearing that the machinery can be detached without losing its essential character or value as a personal chattel.

Cubbins v. Ayres, 4 Lea (72 Tenn.), 329; *McDavid v. Wood*, 5 Heisk. (52 Tenn.), 95, 96; *Saunders v. Stallings*, Id., 65, 72. The real question arises on the provision in the lease retaining a lien on all of the personal property that might be subsequently placed on the leased land. The clause forbidding removal of the machinery prior to the payment of the royalties was not intended to confer title on the lessor, but only as a means of securing the enforcement of the lien. The clause retaining a lien on future acquired property brought on the premises was good as between the lessor and lessee, whether becoming fixtures or not. As to whether things attached to the land should be held fixtures would be largely a question of intention. *Cubbins v. Ayres*, supra; *McClung v. Carriage & Wagon Co.*, 117 Tenn., 250, 96 S. W., 960. But, whatever the intention of the lessor and lessee, it would not bind the interests of a third party selling personal property to the lessee retaining title. The principles that governed in the case of *Union Bank v. Wolf*, 114 Tenn., 255, 86 S. W., 310, 108 Am. St. Rep., 903, 4 Ann. Cas., 1070, would not control here. The claimant against the right there asserted in behalf of the conditional vendor was a subsequent mortgagee who was held to be an innocent purchaser, and also protected by the policy of our registration laws. The question presented in the case now before us was reserved in that case. 114 Tenn., 270, 86 S. W., 310, 108 Am. St. Rep., 903, 4 Ann. Cas., 1070. Here the lessor, at best, can stand only in the position of a prior mort-

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gagee or lienee, asserting a lien on subsequently acquired property of the mortgagor, or lienor. He could claim only such rights as his lessee acquired in the subsequently placed property, which, in the present case, was but an equity, unless, indeed, it should appear that the removal of the machinery from its attachment to the land would injure the latter; but this does not appear. The English authorities take a contrary view. But the American authorities overwhelmingly sustain the rule which we have just announced. 1 British Ruling Cases, pp. 678-686, note. The cases are there collected. It does not need extended reasoning to prove that the American rule is fundamentally sound and just. The English rule seems based on a line of cases which appear to us to rest largely on technical grounds. The later cases in that jurisdiction seem to confess that the state of the law there is not satisfactory on this subject, but recognize that only legislation can change it.

We are of opinion there is no error in the decree of the court of civil appeals, and it is therefore affirmed.

KENNETH B. KENNER v. MARY NICE KENNER.

(Knoxville. September Term, 1917.)

1. DIVORCE. Jurisdiction. Residence of parties. Fraud.

Although, where plaintiff went to a foreign jurisdiction solely for the purpose of instituting divorce proceedings on service by publication, the decree may be attacked for fraud by action in a foreign State, yet such attack cannot be sustained where the plaintiff removed with the *bona-fide* purpose of making a home in such State. (*Post*, pp. 218-220.)

Cases cited and approved: *Gettys v. Gettys*, 71 Tenn., 250; *Chaney v. Bryan*, 83 Tenn., 599; *Thomas v. King*, 95 Tenn., 60; *Colburn v. Colburn*, 70 Mich., 647; *Hunter v. Hunter*, 64 N. J. Eq., 277; *Fosdick v. Fosdick*, 15 R. I., 130; *Thompson v. Thompson*, 91 Ala., 591; *Dunham v. Dunham*, 162 Ill., 589; *Gordon v. Munn*, 87 Kan., 624; *Succession of Benton*, 106 La., 494; *Felt v. Felt*, 59 N. J. Eq., 606; *Bidwell v. Bidwell*, 139 N. C., 402; *Cheever v. Wilson*, 9 Wall., 108; *Cheely v. Clayton*, 110 U. S., 701; *Haddock v. Haddock*, 201 U. S., 562; *Howard v. Strode*, 242 Mo., 210; *Buckley v. Buckley*, 50 Wash., 213; *Joyner v. Joyner*, 131 Ga., 217; *Toncray v. Toncray*, 123 Tenn., 476.

Code cited and construed: Secs. 4203, 4207 (S.).

2. DIVORCE. Jurisdiction. Service by publication.

Jurisdiction of the defendant in divorce may be acquired in the foreign State by publication or other substituted service, although the defendant is a nonresident, and never has been in the State where suit was brought. (*Post*, pp. 218-220).

3. DIVORCE. Operation and effect. Foreign decrees. Custody and support of children.

The effect of a foreign decree, rendered on substituted service, is to free both spouses from the bonds of matrimony, where recognized; but recognition is optional, not being required by

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the full faith and credit clause of the federal Constitution, but may be given on ground of comity. (*Post*, pp. 218-220.)

4. DIVORCE. Operation and effect. Foreign divorces.

Since the State by Shannon's Code, sections 4203, 4207, provides for rendering divorce decrees in favor of a resident against a non-resident, on service by publication, it should accord validity to decrees similarly rendered in other States where the proceedings are not open to attack for fraud. (*Post*, pp. 218-220.)

5. DIVORCE. Custody of child. Interest of child.

In determining the question of custody of infant children, the primary inquiry concerns their welfare rather than the technical legal right of the father to their possession and services. (*Post*, pp. 220-222.)

Cases cited and approved: *State ex rel. Paine v. Paine*, 23 Tenn., 523; *Ward v. Roper*, 26 Tenn., 111; *Gardenhire v. Hinds*, 38 Tenn., 403; *State ex rel. v. Kilvington*, 100 Tenn., 227; *Baskette v. Streight*, 106 Tenn., 549; *Re Alderman*, 157 N. C., 507; *Seeley v. Seeley*, 30 App. Cas. (D. C.), 191; *Re Bort*, 25 Kan., 308.

6. DIVORCE. Custody of children. Modification of order.

Although in an award of the custody of child to mother in divorce proceedings the father should be accorded, by court order, as matter of right, permission to see his child on proper occasions, yet this is a matter for the foreign court which granted the divorce, which would, no doubt, make a suitable order on the subject upon proper request. (*Post*, pp. 222, 223.)

7. DIVORCE. Custody of child. Jurisdiction.

The order of a State court directing that the custody of a child, of parents divorced by foreign court, shall alternate monthly between them, is beyond the court's power, where the child's domicile is with the mother in such foreign State. (*Post*, pp. 222, 223.)

Cases cited and approved: *Wills v. Wills*, 104 Tenn., 382; *Hoffman v. Hoffman*, 15 Ohio St., 427; *Neil v. Neil*, 38 Ohio St., 558; *Miner v. Miner*, 11 Ill., 43; *Williams v. Williams*, 13 Ind., 523;

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Stone v. Stone, 158 Ind., 628; Morrill v. Morrill, 83 Conn., 479; Neville v. Reed, 134 Ala., 317; Green v. Campbell, 35 W. Va., 698; Wakefield v. Ives, 35 Iowa, 238; Kline v. Kline, 57 Iowa, 386; Rodgers v. Rodgers, 56 Kan., 483.

8. **DIVORCE. Custody of child. Judgment as to custody.**

As between the parents, the decree of divorce of a foreign court awarding the custody of the child is *res adjudicata*, subject to modification only by the court granting the decree, with the qualification, in case of removal of the child to another State, the courts of such State may, on change of circumstances, make new disposition of child as its best interests may require. (*Post*, pp. 223, 224.)

Cases cited and approved: Hammond v. Hammond, 90 Ga., 527; Wilson v. Elliott, 96 Tex., 472; Hardin v. Hardin, 168 Ind., 352; Bennett v. Bennett, Deady 299; People ex rel. v. Hickey, 86 Ill. App., 20; Everitt v. Everitt, 29 Ind. App., 508.

9. **DIVORCE. Custody of child. Domicile of child.**

In awarding custody of a child in divorce proceedings, the domicile of the infant is unimportant, and will not be controlled by the legal right of a nonresident father to custody when actually in the custody of the mother; the court being solely concerned with the child's best interests. (*Post*, pp. 225, 226.)

Cases cited and approved: Allen v. Thomason, 30 Tenn., 536; Farrow v. Farrow, 81 Tenn., 120.

10. **DIVORCE. Custody of child. Proper parties. Child.**

In a proceeding by a father to procure the custody of his child from the possession of his divorced wife, the infant was not a proper party. (*Post*, p. 226.)

11. **DIVORCE. Parties. Guardian ad litem.**

In a proceeding by a father to obtain the custody of his child from his divorced wife, a minor, the court properly refused to appoint a guardian *ad litem* for the wife, since her personal rights and those of the child may be properly protected without such guardian. (*Post*, p. 226.)

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12. DIVORCE. Interlocutory order. Dismissal. Effect.

An interlocutory order pending divorce suit concerning temporary custody of the child is abolished by voluntary dismissal of the suit, and cannot be *res adjudicata*, since it was never a final decree. (*Post*, pp. 226, 227.)

FROM SULLIVAN.

Appeal from the Chancery Court of Sullivan County.—HAL H. HAYNES, Chancellor.

L. D. SMITH, C. W. MARGRAVES and S. F. POWEL,
for appellant.

H. H. SHELTON and HARR & BURROW, for appellee.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

Complainant and defendant were both born and reared in Hawkins county, this State. On the 23d of January, 1913, they went to Asheville, N. C., and were married, returning to the home of the husband's parent, where they lived until shortly before their separation. On December 12, 1913, a girl child was born to them. Shortly after the birth of this child, on the 20th of December, 1913, they separated. In March, 1914, Mrs. Kenner removed to Birmingham, Ala., to make her home with her brother, Dr. C. M. Nice, who had resided there for some years, and was

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engaged in the practice of medicine at that place. Her purpose in removing to Alabama was to make that State her future home. She took the child with her, at the time she removed to Alabama, and has ever since retained it. The separation was caused by the cruel treatment which was inflicted by the husband upon the wife, it appearing that he committed violence on her person, and in other ways treated her with great indignity. At first she took up her residence at the home of her father in Rogersville, Hawkins county, but the attentions of her husband, against whom she had conceived an intense antipathy on account of his cruelties and indignities, so annoyed her that she resolved to remove to Alabama, with the double purpose of making her home there and so escaping her husband, and at the same time of obtaining a divorce from him, after the requisite residence of one year in Alabama, according to the laws of that State. After she had lived in Alabama one year she filed her bill of divorce in the chancery court of Jefferson county in that State. Her husband remaining in Tennessee, he was proceeded against as a nonresident, and due publication was made for him, as required by the laws of Alabama, and in addition a copy of the bill was mailed to him, which he duly received. After such service, an order *pro confesso* was entered against the defendant to that bill, he having failed to enter his defense, and likewise evidence was introduced and heard fully sustaining the bill. He went to Birmingham and employed counsel to watch the proceedings

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and make report to him. This was done. He forbade the counsel to enter his appearance in the case. In due time the decree for divorce absolute, in accordance with the laws of Alabama, was entered reciting as ground for divorce the cruelties and personal violence which had been inflicted upon the complainant by her husband. This decree awarded the custody of the child to the mother. This child was then but a little over a year old. When she was taken to Alabama by her mother she was very small even for a child of her age, and was in very delicate health. She needed the constant attention of a physician. Mrs. Kenner's brother, with whom she lived, was a specialist in children's diseases, and he bestowed upon the child all needed medical attention. The decree of the Alabama court of Jefferson county did not give the husband any right to see the child, but he went to Alabama after the divorce had been granted, and was permitted, on two occasions, by the mother, to see the child. A short time after the entry of the Alabama decree Mrs. Kenner returned to Rogersville, Tenn., to the home of her father, for the purpose of making a visit, taking with her the child. The visit was made principally on account of the health of the child, the wife entertaining the belief, on advice, that the climate of East Tennessee would be better for the child at the time the visit was made. While Mrs. Kenner was on this visit the complainant, her former husband, filed his bill in the present case for the purpose of setting aside the decree of the Alabama court on the

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ground that it was obtained by fraud, and also for the purpose of securing custody of the child, or at least the opportunity of having custody for a part of the time. Chancellor Haynes, before whom the case was tried, after a very full consideration of it, and after finding the facts as we have found them, declined to give any relief to the complainant, and dismissed the bill. Thereupon an appeal was prayed and prosecuted to the court of civil appeals. That court, while expressing its view of the facts contrary to those we have stated, yet declined to interfere with the divorce, but was content to decree to the complainant the right to see the child at certain intervals. The court directed that a decree should be entered containing the following provisions:

“The father and mother shall be given the monthly custody, control, and society of their child. The husband shall at other times have the right to look after and secure the support, education, and welfare of the child. Each party will be required to enter into a bond of \$5,000 not to permanently remove the child from the jurisdiction of the chancery court of Hawkins county. While the mother may take the child on a visit to Birmingham, or elsewhere, she will not be permitted to keep it out of the jurisdiction of the courts of this State for a longer period than a month, and the father will not be allowed to keep the child, until further orders, without its jurisdiction for a longer period than a month.”

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Both sides filed petitions for the writ of *certiorari* to remove the case from the court of civil appeals to this court.

Although it is true, a divorce decree procured in a foreign State without personal service of process on the defendant therein, the latter having been made a party only by publication or other substituted process, under the foreign law, and the plaintiff in such proceeding having gone to the foreign jurisdiction solely for the purpose of instituting such litigation, may be successfully attacked by a bill for fraud in any other State wherein rights are claimed under such decree (*Gettys v. Gettys*, 3 Lea [71 Tenn.], 260, 31 Am. Rep., 637; *Chaney v. Bryan*, 15 Lea [83 Tenn.], 599); yet such attack cannot be sustained when it appears, as in the present case, that the party obtaining the decree removed to the foreign State with the *bona-fide* purpose of making a home in that State, although entertaining at the same time a purpose to bring in the latter State an action for divorce as soon as a domicile therein could be acquired (*Thomas v. King*, 95 Tenn., 60, 31 S. W., 983; *Colburn v. Colburn*, 70 Mich., 647, 649, 38 N. W., 607; *Hunter v. Hunter*, 64 N. J. Eq., 277, 281, 53 Atl., 221; *Fosdick v. Fosdick*, 15 R. I., 130, 23 Atl., 140). Jurisdiction of the person of the defendant may be acquired in the foreign State by publication, or other substituted service, although the defendant is in fact a nonresident. *Thomas v. King*, supra; *Thompson v. Thompson*, 91 Ala., 591, 8 South., 419, 11 L. R. A., 443; *Dunham*

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v. *Dunham*, 162 Ill., 589, 44 N. E., 841, 35 L. R. A., 70. And this applies to either spouse, although the other has never been in the State where the suit is brought; and on such service a decree can be obtained which should be respected in another jurisdiction. 9 R. C. L. Divorce, section 336; *Thompson v. Thompson*, supra; *Dunham v. Dunham*, supra; *Gordon v. Munn*, 87 Kan., 624, 125 Pac., 1, Ann. Cas., 1914A, 783; *Succession of Benton*, 106 La., 494, 31 South., 123, 59 L. R. A., 135, and note on page 146, second col., par. 3 et seq., and pages 148, 149, and pages 167 and 168; *Felt v. Felt*, 59 N. J. Eq., 606, 45 Atl., 105, 47 L. R. A., 546, 83 Am. St. Rep., 612; *Bidwell v. Bidwell*, 139 N. C., 402, 52 S. E., 55, 2 L. R. A. (N. S.), 324, 329, 330, 111 Am. St. Rep., 797, 803. And see *Cheever v. Wilson*, 9 Wall., 108, 19 L. Ed., 604; *Cheely v. Clayton*, 110 U. S., 701, 4 Sup. Ct., 328, 28 L. Ed., 298; notes to 53 Am. St. Rep., 183, 94 Am. St. Rep., 554, 16 L. R. A., 499, and 5 Ann. Cas., 28. The effect of such a decree, in a State that chooses to recognize it, is to free both spouses from the bonds of matrimony previously binding them. 9 R. C. L., p. 508, section 330, note 14. But it is optional with each State to accord recognition, or to refuse it, since a refusal has been held by the highest authority not to violate the full faith and credit clause of the federal Constitution. *Haddock v. Haddock*, 201 U. S., 562, 26 Sup. Ct., 525, 50 L. Ed., 867, 5 Ann. Cas., 1. That is, the courts of the several States may still recognize such foreign decrees on the ground of comity, as suggested in the

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case just cited. And see *Howard v. Strobe*, 242 Mo., 210, 146 S. W., 792, Ann. Cas., 1913C, 1057; *Felt v. Felt*, supra; *Buckley v. Buckley*, 50 Wash., 213, 96 Pac., 1079, 126 Am. St. Rep., 900, 907; *Joyner v. Joyner*, 131 Ga., 217, 62 S. E., 182, 18 L. R. A. (N. S.), 647, 127 Am. St. Rep., 220, and note. The fact that the State in which recognition is sought provides by its own laws (as in Tennessee, Shannon's Code, sections 4203, 4207), for the rendering of such decrees in favor of a resident against a nonresident on publication, indicates the duty of according validity, on the ground of comity, to similar action in other States, where there is no material evidence of unfairness and the proceedings are not open to an attack for fraud, as previously explained. *Joyner v. Joyner*, supra. In our own State, in a rather recent case, this policy has been declared. *Toncray v. Toncray*, 123 Tenn., 476, 491, 492, 131 S. W., 977, 34 L. R. A. (N. S.), 1106, Ann. Cas., 1912C, 284.

Should such foreign decree be accorded binding force when it purports to determine the right of custody of the children of the marriage, when such children were in the foreign State, in the custody of the plaintiff therein, where the suit was brought, and where the decree was pronounced or should the defendant in that suit, aside from grounds of fraud, be permitted to reopen the question, on such child or children being brought into the residence State of such defendant, for a temporary purpose, as for a visit?

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We are of the opinion that, under the circumstances stated in the question, the decree should be held binding on the parties thereto. Where the father loses custody of his infant children, and their disposition is brought before a competent court for determination of the question, the primary inquiry concerns the welfare of the children, not the technical legal right of the father to their possession, to use them at once, or at some future day, when grown older for the benefit of their services; and this is emphatically true when the person who invokes the aid of the court is the mother of the children, and a worthy woman. *State ex rel. Paine v. Paine*, 4 Humph. (23 Tenn.), 523. And see *Ward v. Roper*, 7 Humph. (26 Tenn.), 111; *Gardenhire v. Hinds*, 1 Head (38 Tenn.), 403; *State ex rel. v. Kilvington*, 100 Tenn., 227, 45 S. W., 433, 41 L. R. A., 284; *Baskette v. Streight*, 106 Tenn., 549, 62 S. W., 142. *State ex rel. v. Paine*, just cited, is our leading case on the subject, and has been consistently followed. The report of the case is accompanied by full briefs of very able counsel, and the opinion was prepared by one of our ablest judges. Its just, elevated and humane sentiments must find response in the bosom of every right-thinking man. The dominant thought is that children are not chattels, but intelligent and moral beings, and that as such their welfare and their happiness is a matter of first consideration. And see *Re Alderman*, 157 N. C., 507, 73 S. E., 126, 39 L. R. A. (N. S.), 988, and authorities cited; *Seeley v. Seeley*, 30 App. Cas.

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(D. C.), 191, 12 Ann. Cas., 1058; *Re Bort*, 25 Kan., 308, 37 Am. Rep., 255.

The case presented to the chancellor in Alabama, was that of a mother who had been grossly abused by her husband, and of a girl child less than two years old, delicate, weak, sickly, in the custody of her mother, and constantly needing and receiving the loving care of that mother. The disposition of this child was an integral part of the case, practically inseparable from it, and so calling for the judgment of the chancellor thereon. *Wills v. Wills*, 104 Tenn., 382, 389-390, 58 S. W., 301. Who can say that a different judgment should have been rendered even if the father of the child had been present, and had offered the most strenuous opposition? But it is suggested the father should be permitted to see the child on proper occasions; that this should be accorded him as a matter of right, by the court, not as a voluntary concession by the mother. This is a matter for the Alabama court. That court, on being applied to, would no doubt even now make a suitable order on the subject; such power being held essentially in reserve by all courts in such cases. *Hoffman v. Hoffman*, 15 Ohio St., 427, 434, 435; *Neil v. Neil*, 38 Ohio St., 558; *Miner v. Miner*, 11 Ill., 43, 49, 50; *Williams v. Williams*, 13 Ind., 523, 528; *Stone v. Stone*, 158 Ind., 628, 64 N. E., 86; *Morrill v. Morrill*, 83 Conn., 479, 484, 77 Atl., 1. And see *Neville v. Reed*, 134 Ala., 317, 32 South., 659, 92 Am. St. Rep., 35; *Green v. Campbell*, 35 W. Va., 698, 14 S. E., 212, 29 Am.

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St. Rep., 843. But such an order as the learned court of civil appeals directed to be entered in the present case would virtually deny the child's mother the right to retain her home in Alabama, since it would compel her to return to Tennessee every month, so that the child's father might have the opportunity of seeing the child that often.

Other jurisdictions are in accord. The determining fact seems to be that the child was in the foreign State in the custody of the parent who had there acquired a domicile, and was there suing for divorce, at the time the foreign court passed its decree. *Wakefield v. Ives*, 35 Iowa, 238; *Kline v. Kline*, 57 Iowa, 386, 10 N. W., 825, 42 Am. Rep., 47; *Rodgers v. Rodgers*, 56 Kan., 483, 43 Pac., 779; *Seeley v. Seeley*, *supra*. Where the child is within the local jurisdiction the court has the power to award its custody to the one parent or the other; when it is not within that jurisdiction, no such power exists. Cases *supra*.

We are of the opinion that as between the parents, parties to the litigation, the decree of the foreign court awarding the custody of the children is *res adjudicata*, subject, as between those parties, to modification only by the court that granted the decree. *Hammond v. Hammond*, 90 Ga., 527, 16 S. E., 265; *Wilson v. Elliott*, 96 Tex., 472, 73 S. W., 946, 75 S. W., 368, 97 Am. St. Rep., 928; *Hardin v. Hardin*, 168 Ind., 352, 81 N. E., 60; *Bennett v. Bennett*, Deady, 299, Fed. Cas., No. 1318. However, we think this

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doctrine should be understood with the qualification that, in case of the removal of the child to another State, even within the custody of the parent to whom that custody had been awarded by the foreign decree of divorce, the courts of the State to which the removal has been effected will have the power, on a change of circumstances showing such course essential to the best interests of the child, to make a new disposition of the child. *People ex rel. v. Hickey*, 86 Ill. App., 20; *Re Bort*, supra; *Re Alderman*, supra. And see *Wilson v. Elliott*, supra; *Neville v. Reed*, supra; *Green v. Campbell*, supra; *Everitt v. Everitt*, 29 Ind. App., 508, 64 N. E., 892, 94 Am. St. Rep., 276.

There is nothing in the present case to show that it would be to the interest of the child to change its custody. Such good reason is not found in the fact that the father of the complainant is richer than the father of the defendant, and on that ground the expectations of the former greater. Nor is it a good reason that the father is earning money, and the mother is not; it appearing that the latter through the very competent aid of her father and brother is furnishing, and may be expected to furnish, indefinitely, any needed care and comfort for the child. Moreover, it would require a very strong and urgent case to justify any court in interfering during the brief visit of the mother and child to a point outside of their home State.

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[In opposition to the conclusion we have reached it is urged that the domicile of an infant is that of its father; that the child is incapable of assenting to a change; therefore that there can be no legal change of domicile where the father has not consented; *ergo* when the child, after any attempted change, happens to be found within the jurisdiction where the father resides, the latter can appeal to a court to restore his possession, and that this restoration the court is bound to grant as a matter of right, regardless of the fact that another court having jurisdiction of the mother who had the actual custody of the child at the place of the forum had, in a divorce suit between the father and mother, to which the latter was duly made a party under forms, and by process, recognized by law as binding on him, by its decree awarded custody of the child to the mother. It is a *non sequitur*. The domicile of an infant is frequently of importance where its property rights are involved (*Allen v. Thomason*, 11 Humph. [30 Tenn.], 536, 54 Am. Dec., 55; *Farrow v. Farrow*, 13 Lea [81 Tenn.], 120, 124), but the question is unimportant in divorce cases, as is clearly inferable from the authorities cited, to the effect that when the father has lost custody, the court, finding the custody actually with the mother, will not, in a divorce suit between the parents (although the father be a nonresident), be controlled by the father's legal right to the custody, but solely by what is deemed to be to the best inter-

ests of the child, and will dispose of its future accordingly.

The child was made a party to the present litigation by an amended bill. It is said Chancellor Haynes committed error in refusing to appoint a guardian *ad litem* for her on complainant's application. This was no error, since the child was not a proper party, and was at most only a nominal party; the mother, its custodian, being before the court.

It is said the defendant herself, being a minor when this action was tried, should have had a guardian appointed to defend for her, pursuant to complainant's application for such appointment. This is likewise a mistaken view. She needed no guardian to effect the contract of marriage; nor yet to escape its bond. Still less did she need one to defend the rights she acquired under the decree that freed her. The court itself can protect personal rights of the nature here involved without the aid of a guardian. At all events, since these rights will be fully protected by the decree which we shall order, no harm is done, and the error, if any, is wholly without effect.

It is insisted that the custody of the child was disposed of between the present parties in a former divorce suit between them in Hawkins county, this State. That action was brought by the wife in the chancery court of Hawkins county, but was dismissed by her on her own motion before final decree by leave of the court. While the suit was pending an interlocutory order was made concerning the temporary

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custody of the child, dividing it between the parents. That tentative litigation can have no effect upon the present controversy. When the bill was dismissed the interlocutory order went out with it. This is true as a matter of principle, since there can be no *res adjudicata* without a final decree. But the exact point has been already ruled, as we here decide it, in *Thomas v. King*, *supra*.

The result is, the decree of the court of civil appeals must be reversed, and that of the chancellor dismissing the bill must be affirmed, with costs.

CHICKAMAUGA TRUST CO. v. WILLIAM A. LONAS *et al.*

(Knoxville. September Term, 1917.)

1. PARTITION. Remainders. Sale. Purchasers before appeal.

No court has authority to decree partition between a life tenant and remaindermen, and such a decree is absolutely void, and a purchaser is not protected by Thompson's Shannon's Code, section 4922, providing that purchasers under a decree of the lower court, before writ of error is obtained and *supersedeas* granted, shall not be disturbed. (*Post*, pp. 233, 234.)

Cases cited and approved: Behrn v. White, 108 Tenn., 392; Isham v. Sienknecht, 59 S. W., 779; Holt v. Hamlin, 120 Tenn., 496; McConnell v. Bell, 121 Tenn., 198.

2. JUDGMENT. Collateral attack.

A decree of partition between a life tenant and remaindermen is utterly void, and can be collaterally attacked by remaindermen in a foreclosure action against land assigned to life tenant by the decree and mortgaged by him. (*Post*, pp. 234-238.)

Cases cited and approved: Turley v. Taylor, 71 Tenn., 171; Campbell v. Bryant, 2 Tenn. Cas., 146; Starkey v. Hammer, 60 Tenn., 438; Day v. Micou, 18 Wall., 156; Windsor v. McVeigh, 93 U. S., 274; Ritchie v. Sayers, 100 Fed., 520; Wall v. Wall, 123 Pa., 545; Risley v. Phenix Bank, 83 N. Y., 318; Wilkins v. McCorkle 112 Tenn., 688.

Cases cited and distinguished: Isham v. Sienknecht, 59 S. W., 779; Biglow v. Forrest, 76 U. S., 339; *Ex parte Lange*, 18 Wall. (85 U. S.), 163; U. S. v. Walker 109 U. S., 258; Seamster v. Blackstock, 83 Va., 235.

3. LIFE ESTATES. Mortgages. Validity.

Where life tenant mortgaged land assigned to him under a void partition decree, the mortgage was valid as against the interest of the life tenant in the land covered by the trust deed, although void as against remaindermen. (*Post*, pp. 238, 239.)

FROM GRAINGER.

Error to the Chancery Court of Grainger County.—
HUGH G. KYLE, Chancellor.

SIZEB, CHAMBLISS & CHAMBLISS, for Chickamauga
Trust Co.

FRANK PARK, JR., for Wm. A. Lonas and wife.

JOHN R. KING, for Comfort Knox Lonas and others.

MR. JUSTICE WILLIAMS delivered the opinion of the
Court.

The bill of complaint is one seeking the foreclosure of a trust deed executed by William A. Lonas and wife, which conveyed a tract of four hundred acres of land, to secure the payment of a note for \$8,000 and interest due to complainant Trust Company. The minor children of Lonas and wife were joined as defendants in order to the ascertainment of the rights of complainant and these minors, respectively, in the land, and to an adjudication that minors had no interest therein.

The land covered by the trust deed and another tract had been conveyed to Lonas and wife for their joint lives and to the survivor of them for life, with remainder to their children, the minor defendants.

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Lonas had become involved financially, and he and his wife had previously mortgaged their interests in both of the tracts, and the mortgagees were threatening to foreclose. In this attitude of affairs; Lonas applied to complainant for a loan, offering his and his wife's interests in both tracts as security. On learning that their interests were merely estates for life, the trust company declined to grant the loan. It was then asked whether an application for a loan would be considered if proceedings in court were had for a partition of all the lands between Lonas and his wife as life tenants and their children as remaindermen, thus procuring the setting off to the applicants of a portion of the land in fee simple, same then to be subjected to a mortgage or trust deed in favor of the trust company. Assurance was given that the loan would be made if this result could be accomplished.

Lonas and wife thereupon filed a bill in chancery against their children, praying that the relative value of their interests in the land as life tenants be ascertained, and that a partition be decreed as above outlined. By allegations in that bill it was sought to show that such a partition would be to the advantage of the minors, but no decree was sought to sell the minor's remainder estate for reinvestment.

That cause was prosecuted to a decree such as Lonas and wife sought, under which they were assigned four hundred acres out of a total of five hundred and sixty acres of the lands, their children taking the

balance. The record of that proceeding was exhibited to the trust company, and it proceeded to lend the \$8,000 on the security of the lands which had been thus assigned in partition to Lonas and wife.

After the loan was made, the minor defendants in the partition proceeding prosecuted a writ of error from the partition decree to the appellate court, and with success. The decree for partition was reversed by the court of civil appeals, the decree being affirmed by this court on the ground that the chancery court was without power to partition in severalty and in kind the lands as between the father and mother as tenants for life and their children as remaindermen.

Lonas made default in the payment of the trust debt, and the present suit was brought, as above stated, to bring to foreclosure the trust deed. The minors were made defendants in an effort to have the validity of the decree in the partition case declared as against them and to have the four hundred acres covered by the trust deed sold in bar of any claim of the minors.

The chancellor decreed in favor of the trust company, but on appeal the court of civil appeals reversed that decree; and the trust company has brought the cause before this court by the writ of *certiorari*.

For the complainant, it is advanced that the loan was made by it on the strength of the title acquired

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by Lonas and wife under the proceedings and decree in the partition cause, and on faith that they were regular and valid, and without knowledge or suspicion that the minors would prosecute a writ of error to any appellate court for review and reversal. Complainant relies upon Thompson's Shannon's Code, section 4922, as construed in *Behrn v. White*, 108 Tenn., 392, 67 S. W., 810, as constituting it an innocent purchaser of the four hundred acre tract to the extent of its loan, as against the minors, notwithstanding the subsequent reversal of the decree which purported to vest title in Lonas and wife and divested it out of their minor children. That section of the Code is as follows:

“If the judgment or decree below has been executed by a sale of property, either real or personal, before the writ of error is obtained and *supersedeas* granted, the right, title, and interest of any purchaser, previously acquired under the judgment or decree, shall not be disturbed or affected by the reversal of such decree.”

Without deciding, because not discussed by counsel, the question whether a decree for partition in kind may ever be deemed a decree “executed by a sale of property” so as to protect one standing in the plight of the trust company, we pass to a consideration of the point discussed in the courts below and on the briefs of counsel in this court: Is the partition decree so far void as that complainant is not protected by the statute quoted, or was it competent for the minors to

attack that decree collaterally, or otherwise than in appellate review?

If the partition proceeding under which the trust company claims, and the decree therein, are void on their face, it cannot hold as one protected by the above-quoted Code provision. *Isham v. Sienknecht* (Ch. App.), 59 S. W., 779, 783.

The court of civil appeals was divided upon the question of the nullity of the decree, three of the judges holding it to be void and two dissenting and holding to the chancellor's view.

We are of opinion that the majority members of that court were right in the ruling they made on this interesting question.

It is not within the power of any court in this State, whether of law or equity, to enforce a partition as between the owners of a life estate and the owners in remainder. Our statutes do not contemplate power in a court to entertain a bill of a life tenant of the whole premises against those entitled in remainder, to have the life estate valued, that valuation to be made a basis for such partition. It had been so decided by this court before the partition proceeding was launched by Lonas and wife, in the cases of *Holt v. Hamlin*, 120 Tenn., 496, 111 S. W., 241, and *McConnell v. Bell*, 121 Tenn., 198, 114 S. W., 203, 130 Am. St. Rep., 770.

It is urged by the complainant that the decree cannot be void because the chancery court had jurisdiction over the subject-matter of suits for partition, to which

class of actions it is said this suit belongs, and also jurisdiction of the persons of those who contend for the nullity of the decree.

While the rule is often broadly stated to be that a decree cannot be questioned collaterally where the court had jurisdiction over the parties and the subject-matter, the implication in such case necessarily is that the court proceeded in the exercise of a jurisdiction with which it was clothed to render judgment on the case stated or appearing by implication in the pleadings and on facts found or assumed in the decree.

In *Isham v. Sienknecht* (Ch. App.), 59 S. W., 779, affirmed by this court, it was said in an opinion by the present Chief Justice of this court, speaking of a decree for the sale of land:

“A grave misconception may be conveyed, and no doubt is often conveyed, by the bald statement that the sale is good if the court has jurisdiction of the subject-matter and of the parties. There is an ambiguity concealed in the word ‘jurisdiction.’ . . . We should therefore define ‘jurisdiction’ as follows: It is power and authority constitutionally conferred upon (or constitutionally recognized as existing in) a court or judge to pronounce the sentence of law, or to award the remedies provided by law upon a state of facts proved or admitted, referred to the tribunal for decision, and authorized by law to be the subject of investigation or action by that tribunal, and in favor of or against persons (or *res*) who present

themselves or who are brought before the court in some manner sanctioned by law."

It was there held that a court cannot validly adjudicate upon a subject-matter which does not fall within its province as defined and limited by law; and a decree for sale of land in a court of chancery without allegation of a *nulla-bona* return was, on the facts of that case, held to be void, citing *Turley v. Taylor*, 3 Lea (71 Tenn.), 171. And see *Campbell v. Bryant*, 2 Tenn. Cas., 146; *Starkey v. Hammer*, 1 Baxt. (60 Tenn.), 438.

The principle is thus expressed in 15 R. C. L., p. 853:

"While it is well settled that a judgment cannot be questioned collaterally for an error committed in the exercise of jurisdiction, the rule is equally well established that a judgment may be attacked in a collateral proceeding for error in assuming jurisdiction. Even where a court has jurisdiction over the parties and the subject-matter, yet if it makes a decree which is not within the powers granted it by the law of its organization, its decree is void. Thus a judgment may be collaterally attacked where the court had jurisdiction of the parties and the subject-matter of action, but did not have jurisdiction of the question which the judgment assumed to determine, or to grant the particular relief which it assumed to afford to the litigants. . . .

"One form of usurpation of power on the part of a court in rendering a judgment is where it attempts to disregard limitations prescribed by law restrict-

ing its jurisdiction. . . . Where a court is authorized by statute to entertain jurisdiction in a particular case only, and it undertakes to exercise the power and jurisdiction conferred in a case to which the statute has no application, in so doing it will not acquire jurisdiction, and its judgment will be a nullity and subject to collateral attack."

This doctrine has been oftenest announced and illustrated by the supreme court of the United States. *Bigelow v. Forrest*, 9 Wall. (76 U. S.), 339, 19 L. Ed., 696, was an action of ejectment. Bigelow, who was defendant, relied for title in fee simple on a decree rendered in a proceeding for the confiscation of the premises under act of Congress of July 17, 1862 (chapter 195, 12 Stat., 589), which provided for the condemnation of the interest of the person accused, which in that case was but an estate for life. Referring to this decree as one that would be in excess of the court's powers and, therefore, void, it was said:

"Doubtless a decree of a court having jurisdiction to make the decree cannot be impeached collaterally; but, under the act of Congress the district court had no power to order a sale which should confer upon the purchaser rights outlasting the life of French Forrest."

The decision was followed in *Day v. Micou*, 18 Wall. (85 U. S.), 156, 21 L. Ed., 861, where it was said that nothing more than a condemnation of the life estate, owned by the person proceeded against, was

"within the jurisdiction or judicial power of the district court."

In the later case of *Ex parte Lange*, 18 Wall, (85 U. S.), 163, 21 L. Ed., 873, Mr. Justice MILLER, citing these two decisions, elaborated on their principle, and explained why the district court could not bind beyond its power to act:

"But why could it not? Not because it wanted jurisdiction of the property or of the offense, or to render a judgment of confiscation, but because in the very act of rendering a judgment of confiscation it condemned more than it had authority to condemn. In other words, . . . where it had full jurisdiction to render one kind of judgment, operative on the same property, it rendered one that included that which it had a right to render, and something more, and this excess was held simply void."

In *U. S. v. Walker*, 109 U. S., 258, 3 Sup. Ct., 277, 27 L. Ed., 927, it was said:

"In this case the statute gave the court power, on the removal of an executor or administrator, to order the assets of the decedent, which might remain unadministered, to be delivered to the administrator *de bonis non*. The court made an order directing the delivery of the proceeds of administered assets. This was beyond the power conferred by the statute, and not within the jurisdiction of the court. The order was therefore void."

In *Seamster v. Blackstock*, 83 Va., 232, 2 S. E., 36, 5 Am. St. Rep., 264, it appeared that by statute the

county court was prohibited from decreeing a sale of land for partition when the interest of any party exceeded in value the sum of \$3,000. A decree for sale in such a case was pronounced void, on the authority of *Ex parte Lange*, supra, the record affirmatively showing that the interest of each party exceeded in value said sum.

See, also, *Windsor v. McVeigh*, 93 U. S., 274, 23 L. Ed., 914; *Ritchie v. Sayers* (C. C.), 100 Fed., 520; *Wall v. Wall*, 123 Pa., 545, 16 Atl., 598, 10 Am. St. Rep., 549; *Risley v. Phenix Bank*, 83 N. Y., 318, 38 Am. St. Rep., 421.

This does not contravene another principle, that a decree of a court proceeding within its jurisdiction is beyond collateral attack even though it decided erroneously. A decree cannot be so impeached by showing that the court manifestly proceeded upon undoubtedly erroneous principles, not affecting jurisdiction, in reaching its conclusions.

The doctrine enforced in the instant case is not merely a salutary one, but one essential to the keeping of a tribunal in bounds set for its functioning.

The lack of jurisdiction in the partition suit appears, as it must under the rule in this State, from the face of the record itself. *Wilkins v. McCorkle*, 112 Tenn., 688, 708, 80 S. W., 834, and cases cited.

The ruling of the court of civil appeals on this main question is therefore approved; but it appears that that court, by inadvertance, we assume, dismissed the bill outright, whereas clearly the trust company

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was entitled to a decree of foreclosure against the life tenants, Lonas and wife, in respect of their estates in the lands described in the trust deed. The trust company's assignment of error on that point is sustained.

A decree will pass, modifying the decree of the court of civil appeals in that respect, affirming it in other respects, and remanding the cause for further and consistent proceedings.

JOSEPH KNAFFL *et al.* v. KNOXVILLE BANKING &
TRUST Co.

(*Knoxville*. September Term, 1917.)

1. **APPEAL AND ERROR.** Compromise with debtors. Discretion of chancellor.

In proceeding to wind up affairs of a bank, the chancellor in approving a compromise agreement with the stockholders and directors has a legal and judicial discretion, the abuse of which may be reviewed on appeal. (*Post*, p. 244.)

Cases cited and approved: *Green v. Officers' etc.*, *Knoxville Banking & Trust Co.*, 133 Tenn., 630; *MacDonald v. Aetna Indemnity Co.*, 88 Conn., 571; *Lamar v. Taylor*, 141 Ga., 227.

2. **BANKS AND BANKING.** Compromise with debtors. Discretion of chancellor. Scope of inquiry.

In a proceeding to wind up affairs of bank, where receiver petitioned for leave to compromise claims against stockholders and directors, the inquiry was not limited to whether there were sustainable causes of action against such persons, but the question was whether it was practicable and advantageous to compromise. (*Post*, pp. 244, 245.)

3. **BANKS AND BANKING.** Compromise with debtors. Discretion of chancellor. Scope of inquiry.

In a proceeding to wind up affairs of bank, where the receiver recommended a compromise, and creditors of the bank by their attorneys advised the compromise, and the master, the chancellor, and the court of civil appeals were in favor of the compromise, it was not an abuse of discretion to order it to be made. (*Post*, pp. 245, 247.)

FROM KNOX.

Appeal from the Chancery Court of Knox County
to the Court of Civil Appeals, and by *certiorari* to

Knaff v. Banking & Trust Co.

the Court of Civil Appeals from the Supreme Court.—WILL D. WRIGHT, Chancellor.

WRIGHT & JONES and GREEN, WEBB & TATE, for Jos. Knaff and others.

POWERS & THORNBURGH, for J. C. Kenner.

C. T. CATES, JR., and L. H. SPILMAN, for stockholders and directors.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

The above-entitled cause is a general creditors' proceeding in which the Knoxville Banking & Trust Company is being wound up as an insolvent corporation. John W. Green, Esq., of the Knoxville bar, was appointed receiver of the defendant bank, and is now engaged in winding up its affairs under the direction of the court. In March, 1913, under the direction of the chancellor, Green, as receiver, filed a bill against the principal stockholders of the bank seeking to recover of them dividends which had been paid to them on their stockholdings in the bank during a certain period of time when it is alleged the bank was insolvent.

About the same time the receiver filed another bill of complaint, under the direction of the chancellor, against the directors of the bank, seeking to hold them liable for negligence and willful mismanagement of its affairs.

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To both of the above bills filed by the receiver defenses were interposed by those persons sued. To the bill against the directors a demurrer was filed, which the chancellor sustained, dismissing the receiver's bill. However, the receiver appealed to this court where the chancellor's decree was reversed. The opinion of this court on the demurrer is reported. *Green v. Officers, etc., Knoxville Banking & Trust Co.*, 133 Tenn., 630, 182 S. W., 244. The cause was remanded to the chancery court for further proceedings against the defendant directors.

Thereafter, the various persons sued in both of the two actions placed before the receiver a proposition to compromise the suits, so far as they were concerned. Their offer was recommended for acceptance by the receiver to the chancellor in a petition for guidance filed in the general creditors' cause in May, 1916, in which petition the receiver set forth his reasons for recommending the acceptance of the proposition, which was one for the payment *in solido* of the sum of \$25,000 in satisfaction of all claims against the proposers as stockholders and directors. The chancellor by decretal order referred the matter to the master for a report, upon proof to be taken, whether or not it would be to the best interest of the creditors of the insolvent bank that the compromise offer should be accepted.

A formal and full letter was sent by the special commissioner to all depositors in, and creditors of, the bank, notifying them of the time and place of

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the taking of proof. The depositors in the bank numbered several hundreds, and many of those so addressed replied, stating their judgment and attitude in respect of the acceptance of the compromise offer of \$25,000. A considerable amount of proof was taken in addition.

The chancellor, upon the report of the master favorable to the acceptance being excepted to, passed a decree of confirmation. One creditor alone prosecuted an appeal from the chancellor's decree to the court of civil appeals. The last-named court held that the chancellor's decree was correct.

A petition for *certiorari* was filed by the depositor-creditor above referred to and the cause is before this court for final determination.

On the original hearing we reached the conclusion that, in point of fact, the defendants were so far solvent and possessed of estates that there could be collected from them a much larger aggregate sum than \$25,000, which was one of the questions submitted to the master. We still entertain that opinion.

But we are asked to consider another and preliminary question: What is the probability of judgments being secured against the proposers?

It seems to be conceded and to be clear that a liability for about \$12,500 may be enforced by way of judgment obtained and execution issued against bank for negligence and mismanagement to produce those sued as stockholders. This leaves for determination the probable liability of the directors of the

a fund that will equal or surmount the remaining \$12,500. What is to be further said relates to this phase of the litigation.

The decree of the chancellor approving the making of the compromise adjustment was one entered by him in the exercise of his discretionary power. However, the discretion was not an absolute but a legal or judicial one, the abuse of which may be reviewed on appeal. *MacDonald v. Aetna Indemnity Co.*, 88 Conn., 571, 92 Atl., 154; *Lamar v. Taylor*, 141 Ga., 227, 243, 80 S. E., 1085.

The question brought before the chancellor for decision related to the course of conduct to be pursued by the receiver as an officer of his court, in respect of a matter of prudential policy touching the administration of the assets of the receivership estate. Many and various considerations were to be weighed in arriving at a determination as to what was the course of prudence. The inquiry included the probable validity of the claims urged by the receiver, the difficulties and embarrassment that would attend an effort to enforce same in the courts, the delays and expenses to be incurred, and the collectibility of any judgment if recovered.

The chancellor below was, and the appellate courts on appeal are, not to decide whether the receiver had sustainable causes of action against the stockholders and directors. As is well said in *MacDonald v. Aetna Indemnity Co.*, *supra*, respecting what is to be considered in such a case:

“For the most part these are purely practical considerations. At points, however, some of them touch legal questions quite closely. This is particularly true of the matter of the validity of the claim which is the subject of the proposed compromise. That is an important factor in the situation. No intelligent conclusion, as to wisdom or unwisdom of the proposed compromise, can be arrived at which does not take it into account. And yet the question of validity, important as it is, is not in issue. Its decision is not called for, and none could be made which could possess any other importance than as expressing a personal view. It would bind nobody, and conclude nothing. The inquiry which the trial court was called upon to make had, and that which we are now to make has, no other purpose and possesses no other importance than the ascertainment in a general way of the probable or possible result of litigation of the claim. This inquiry, to be intelligent, must be made by one possessed of legal knowledge, and in the pursuit of it legal knowledge must be employed. But legal decision is not called for.”

Was there an abuse of discretion? If we entertained doubt as to the wisdom of the ruling made in the courts below, we should decline to override the conclusion reached, in the face of the record showing which is as follows:

(a) The receiver, who is an eminent lawyer, of wide experience and high standing in affairs of business, recommended acceptance of the offer of the de-

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endants, on the ground of his doubt as to his ability to show liability on the part of the directors sued. His counsel concur, testifying that a recovery against the directors is doubtful.

(b) Every lawyer who testified on the point, among them several of wide practice and experience, stated that they deemed the proposed compromise to be one to the interest of their clients who held demands against the insolvent estate.

(c) The largest creditors, such as banks and large mercantile concerns who have occasion to weigh and deal with such matters of credits and settlements, recommend that the compromise be concluded.

(d) A large majority of the creditors, whether in number or amount of claims, are of like mind.

(e) On reference to the master he reported in favor of the making of the compromise being authorized by the court, and only two of many hundreds of depositor-creditors excepted to same.

(f) The chancellor approved the report, and passed a decree of authorization, as above stated.

(g) The court of civil appeals concurred with the chancellor, on a review of the record, regardless of a contention that the master and chancellor in concurring had settled the matter.

The amplest opportunity was given to the creditors to be heard in reference to the advisability and acceptability of the offer.

On full consideration we are of opinion that the result reached in the lower courts must be approved

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and the decree affirmed. The petition to rehear is sustained. A decree will pass accordingly, with a remand of the cause to the chancery court for further proceedings.

The costs of the appeal will be paid, one-half by appellant Kenner and one-half by the receiver.

CAROLINA SPRUCE CO. v. BLACK MOUNTAIN R. CO.
(*Knoxville*. September Term, 1917.)

1. **MORTGAGES. Foreclosure sale. Attorney's fees.**

Reasonable fees for a mortgagee's or trustee's attorney may be retained out of the proceeds of a foreclosure sale when provided for in the mortgage. (*Post*, p. 249.)

2. **PLEDGES. Foreclosure of collateral. Attorney's fees.**

Where a promissory note, secured by certain mortgage bonds as collateral, provided that after the proceeds of any sale had been applied to the payment of or a credit upon this note, and after deducting costs and attorney's fees, should any deficiency remain the maker agrees to pay the same, the provision is for the indemnity of the pledgee against loss, and to enable it to recover the whole debt without being charged with attorney's fees, and if the pledgee should be put to the necessity of overcoming legal obstructions in selling the collateral, attorney's fees may be deducted from the proceeds of the sale. (*Post*, p. 250.)

3. **PLEDGES. Foreclosure. Distribution of proceeds.**

Where mortgage bonds securing a promissory note are ordered to be foreclosed, and the note provides for attorney's fees, the decree should fix the basis of distribution of the sale, including such attorney's fees. (*Post*, p. 250.)

FROM WASHINGTON.

Appeal from the Chancery Court of Washington County.—HAL. H. HAYNES, Chancellor.

HARR & BURROW, for appellant.

COX & TAYLOR, JAS. J. McLAUGHLIN, J. R. SIMMONDS and J. BIS RAY, for appellee.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

On motion. In this cause (disposed of in an opinion, 201 S. W., 154) the solicitors of the cross-complainant Black Mountain Railway Company move the court to fix reasonable fees for their services in this cause. The motion is based upon a provision in respect to attorney's fee in the note in suit. This note was one collateral in form; that is, it stipulated that ten mortgage bonds were attached as collateral security, and for a sale thereof by the holder on the maker-pledgor's default. The note then recited:

"After the proceeds of any sale have been applied to the payment of, or a credit upon, this note, and after deducting costs and attorney fees, should any deficiency remain, the undersigned agrees to pay the same to the holder," etc.

The motion is resisted by the pledgor company on the following grounds:

(a) The only provision for fees is for deduction after the foreclosure sale of the collateral, and no allowance should be made at this stage.

(b) If the debt is paid prior to the making of the sale on the remand then the condition upon which fees are to be paid cannot arise.

The contentions are to be resolved by the application of the principles that govern in cases of mortgages and trust deeds. Reasonable fees for a mortgagee's or trustee's attorney may be retained out of the proceeds of a foreclosure sale when provided for in the mortgage; such a provision being valid.

The provision in the notes is construed to be for the indemnity of the pledgee against loss and to enable it to recover the whole debt without his beingonerated with the payment of the fees of counsel. 27 Cyc., 1501, 1782. The fair and reasonable implication is that, if the pledgee should be put to the necessity of overcoming legal obstructions, interposed by the pledgor, in order to bring the collateral bonds to sale, costs and attorney's fees are to be deducted as against the pledgor from the proceeds of the sale when made.

It is proper that the decree awarding foreclosure, in a suit brought to enjoin same, should fix the fee for the reason that the record evidences, in part at least, the amount and character of the services rendered by the attorneys. Such appears to be the practice in mortgage foreclosures. We are of opinion that the cross-bill seeking foreclosure of the pledge lien calls for the fixing of the basis of distribution of the proceeds of the sale, which necessarily involves a consideration of the deduction of the amount of the fees of the solicitors of the pledgee, or holder, if we are correct in our precedent rulings.

No question could be or is made that there was no necessity for the employment of solicitors; and there is no contention that the amount of fees suggested for allowance in the motion is excessive—ten per centum of the recovery. Motion allowed, and a decree will pass in accord.

GEORGE KOBBE v. HARRIMAN LAND COMPANY *et al.*

(*Knoxville*. September Term, 1917.)

1. **VENDOR AND PURCHASER. Notice. Registration of deeds.**
Registration of a deed in M. county at a time when land conveyed thereby was no longer a part of such county was wholly ineffective to give notice. (*Post*, pp. 261, 262.)
2. **VENDOR AND PURCHASER. Prior deeds. Duty to make inquiry.**
Under Thompson's Shannon's Code, section 3749-3750, providing that instruments required to be registered give notice to third persons not having actual notice only from the noting thereof for registration on register's books; section 3751, providing that in case of rival instruments, the instrument first registered or noted for registration shall have preference over one of earlier date not noted for registration, and section 3752, providing that any of said instruments not so proved or acknowledged and registered or noted for registration shall be null and void as to existing and subsequent creditors of or *bona-fide* purchases from the makers without notice, purchaser claiming under deed containing clause excluding older and better titles would not be operated with the duty of making inquiry or investigation for prior conveyances outside of and beyond the registration books provided by law, in the absence of actual notice, being purchasers the same as purchasers under deeds not containing such clauses and their instruments, deeds just the same. (*Post*, pp. 262-264.)

Case cited and distinguished: *Wilkins v. McCorkle*, 112 Tenn., 688.

Code cited and construed: Secs. 3749-3752 (T.S.).

3. **VENDOR AND PURCHASER. Duty of purchaser to make inquiry. Unrecorded deeds.**

It is the duty of one who purchases directly under a deed containing a clause, excluding older and better titles, to explore the land

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for adverse possessions, and to search the public records for prior instruments affecting the title. (*Post*, pp. 264-267.)

4. **VENDOR AND PURCHASER. Knowledge of prior conveyances. Presumption.**

A purchaser under a deed containing an exclusion clause is conclusively presumed to know whatever could have been discovered from the public records or from an investigation for adverse possessions. (*Post*, pp. 264-267.)

5. **VENDOR AND PURCHASER. Actual notice of unrecorded deed. Burden of proof.**

The burden of showing that a purchaser under a deed containing an exclusion clause had actual notice of a prior unrecorded deed was on the party asserting such fact. (*Post*, pp. 264-267.)

6. **VENDOR AND PURCHASER. Exclusion clause. Right of purchaser.**

In the absence of actual notice or notice by record or registration books or by actual adverse occupation of the land, the purchaser, notwithstanding an exclusion clause in a deed in his chain of title, has the right to rest in security. (*Post*, pp. 264-267.)

Acts cited and construed: Acts 1895, ch. 38.

Cases cited and approved: *Iron and Coal Co. v. Schwoon*, 124 Tenn., 209; *Bowman v. Bowman*, 40 Tenn., 48; *Fowler v. Nixon*, 54 Tenn., 719; *Bleidorn v. Pilot Mt., etc., Co.*, 89 Tenn., 204; *Wright v. Hurst*, 122 Tenn., 656; *Campbell v. Ice & Coal Co.*, 126 Tenn., 530.

7. **VENDOR AND PURCHASER. Unrecorded deed. Rights of purchaser.**

An unregistered deed, though good between the immediate parties, is incomplete in law, and incapable of conveying the title as against subsequent purchasers not shown to have had actual notice. (*Post*, pp. 267-271.)

8. **VENDOR AND PURCHASER. Notice. Subsequent recording. Effect.**

Recording a deed after the land has been conveyed by a registered deed to a *bona-fide* purchaser is without efficacy. (*Post*, pp. 267-271.)

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9. VENDOR AND PURCHASER. Notice. Records of old county. Duty to search.

An immediate purchaser from one having deed containing clause excluding older and better titles would not be bound to search records of M. county after the land embraced by the deed had been transferred by the legislature to a new county. (*Post*, pp. 267-271.)

Cases cited and approved: *Perkins v. Hays*, 3 Tenn., 163; *Land Co v. Hilton*, 121 Tenn., 308.

10. DEEDS. Property conveyed. Exclusion clause.

In the absence of a description of the excluded land in the deed itself a deed, notwithstanding a clause excluding older and better titles, conveys all that it describes. (*Post*, pp. 267-271.)

Cases cited and approved: *Bowman v. Bowman*, 40 Tenn., 48; *Fowler v. Nixon*, 54 Tenn., 719; *Bleldorn v. Pilot Mountain, etc., Co.*, 89 Tenn., 204; *Iron & Coal Co. v. Schwoon*, 124 Tenn., 209; *East Tenn. Coal Co. v. Taylor*, 131 Tenn., 11; *Brier Hill Collieries Co. v. Gernt*, 131 Tenn., 542; *Northcut v. Church*, 135 Tenn., 541.

11. VENDOR AND PURCHASER. Rights as against inferior title.

As in a proceeding in which the land in question was attached and sold as the property of K. only such title as was possessed by him could be passed by decree, notice from recording of such decree would be ineffectual as to parties claiming under a deed superior to K.'s. (*Post*, pp. 271-273.)

12. COURTS. Rule of stare decisis. Unreported opinion.

An unreported opinion, affirming an erroneous decision of the chancellor without opinion, will not be followed under the rule of *stare decisis*. (*Post*, pp. 273-274.)

Cases cited and approved: *Randolph v. Merchants' National Bank*, 77 Tenn., 69; *Isham v. Slenknecht*, 59 S. W., 779; *Reynolds v. Stockton*, 140 U. S., 254; *Wilkins v. Railroad*, 110 Tenn., 442.

13. ESTOPPEL. By pleading. Mutuality.

Where neither complainant nor his predecessors in title were connected with a litigation against defendant's predecessor or had any knowledge of allegations in pleadings therein, there could be no estoppel in favor of complainant by reason of al-

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legations against defendant or its predecessor; there being no mutuality as a basis therefor, and no privity between complainant and defendant's predecessor. (*Post*, pp. 274-279.)

Cases cited and approved: *Tate v. Tate*, 126 Tenn., 169; *Ross v. Cobb*, 17 Tenn., 469; *Singleton v. Ake*, 22 Tenn., 626.

14. **VENDOR AND PURCHASER.** Rights as against unrecorded deed.

That defendant's predecessor in title was an attorney for G., the common source of title, would not prevent him from lawfully acquiring the title of a grantee having a prior registered deed, even though he had knowledge of an unrecorded deed from G. (*Post*, pp. 279-281.)

FROM CUMBERLAND.

Appeal from the Chancery Court of Cumberland County.—A. H. ROBERTS, Chancellor.

JOHN M. DAVIS, CASSELL & HARRIS and JAMES A. MONROE, for appellant.

W. T. SMITH, CLINTON ROE and L. D. SMITH, for appellees.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

This was an ejectment bill filed in the chancery court of Cumberland county to recover about five thousand acres of land. There were voluntary dismissals, however, as to all of the material defendants except the Cumberland Lumber Company, and it claims a much smaller acreage than that just stated,

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the exact amount of which it is unnecessary to note. The chancellor dismissed the bill, and the complainant has appealed, and assigned errors.

The facts, so far as it is necessary at this point to relate, are as follows:

The complainant, and the defendant Cumberland Lumber Company, claim from a common source, one George F. Gerding. The land involved was embraced in Morgan county entry No. 1980, on which was issued grant No. 21987, to Thomas B. Eastland, June 30, 1838. This land subsequently by legal conveyances became the property of Gerding. He made four several conveyances of it. Under one of these the complainant Kobbe claims; under two of the others the defendant lumber company. The fourth, the lumber company relies on for the defense of outstanding title, in case its reliance on the two others just mentioned and its defense of adverse possession shall be found unsupported in fact, or not sustained in law.

Complainant's chain of title, starting with the common source, runs as follows: Deed of Gerding to William A. Kobbe dated October 8, 1866, and an attachment proceeding by Gerding against William A. Kobbe in the chancery court of Anderson county, wherein an ancillary attachment was issued to Cumberland county, and this land levied on as the property of Kobbe. The style of that case was, *George F. Gerding v. William A. Kobbe and Others*, and *William A. Kobbe v. George F. Gerding and Others*. The latter was a cross-bill, which was voluntarily

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dismissed by Kobbe. The case then went to a hearing at the May term, 1872, of the Anderson chancery court on the original bill and the answer thereto, whereupon a judgment was rendered in favor of Gerding and against Kobbe for \$69,000, and a decree was entered ordering the land to be sold for the payment of this judgment. A report of sale was made by the commissioner, showing that the land had been purchased by Mrs. Sarah Lord Kobbe, and the decree of confirmation recited that the complainant George F. Gerding had assigned his judgment against William A. Kobbe to the purchaser, Sarah Lord Kobbe, and it was directed that her bid should be held satisfied by payment of the costs and commissions. In confirming this sale the decree not only purported to divest title out of the defendant, William A. Kobbe, and to vest it in Sarah Lord Kobbe, but also purported to do the same in respect of Gerding, the complainant in that case. This decree was registered in Cumberland county July 3, 1873. Sarah Lord Kobbe made a deed of this land to complainant, George C. Kobbe, December 16, 1884, which was registered in Cumberland county November 17, 1887. She and her husband had previously, February 5, 1880, made a deed to George C. Kobbe for this same land. This deed was registered in Cumberland county August 25, 1916.

George F. Gerding had become owner of the land by deed from one Henry Wells of date January 27, 1844, which was recorded in the register's office of

Morgan county, where the land then lay, on April 10, 1844.

When Cumberland county was created in 1855, this land was included within the bounds of the new county. This new county, so created in 1855 by an act of the legislature, was organized, and the register's books opened on the first Monday in April, 1856.

The deed, above mentioned, which George F. Gerding made to William A. Kobbe on October 8, 1866, and which was the foundation of the attachment proceedings in Anderson county already mentioned, was never registered in Cumberland county.

The defendant traces its title to two deeds made by George F. Gerding, each the beginning link in separate chains of title, which finally united in one of defendant's predecessors in title before defendant obtained its own deed. The first of these chains begins with a deed made by George F. Gerding to D. F. Wilkin on February 6, 1856, acknowledged in due form February 16, 1856, and regularly registered in the register's office of Morgan county, the land then being a part of Morgan county, on the same day, February 16, 1856. The defendant derails title through a regular succession of conveyances from this deed. The complainant has no claim on and no connection with this chain of conveyances.

The second deed made by Gerding was executed on June 12, 1856, to Samuel C. Roberts, the land then being a part of Cumberland county. This deed was probated before the clerk of the county court of

Morgan county May 10, 1873. It was recorded in the register's office of Morgan county May 10, 1873, and in the register's office of Cumberland county August 12, 1873. The defendant connects itself with this deed by a regular sequence of conveyances. The complainant makes no claim on and has no connection with this chain of title.

The third deed made by Gerding was made to one Charles B. Slausson, and was dated on its face December 18, 1855, but it is contended by complainant that this deed was antedated, and that the real, or true, date was June 14, 1856. This deed was recorded in Morgan county on October 9, 1856, and in Cumberland county January 19, 1915. Neither complainant nor defendant claim any connection with this deed, and, if any title arises out of it, such title can operate only as an outstanding one.

The fourth conveyance made by Gerding was the one which we have already mentioned in setting out complainant's chain of title, the deed of October 8, 1866, to William A. Kobbe.

On the facts so far stated it is evident, no other facts appearing, that defendant has the elder, and therefore the true, title of Gerding, under the chain beginning with the deed of Gerding to D. F. Wilkin of date February 6, 1856. But defendant's claim thereunder is attacked by evidence which shows that Gerding's deed to Wilkin, after setting forth as conveyed therein a list of some twenty different entries and grants, estimated to contain about 52,100

acres, and, among the tracts, the land in controversy, entry No. 1980 in the name of William G. Sims, grant No. 21987 for 5,000 acres dated June 30, 1838, contains an exclusion clause in these words:

“In all about 52,100 acres, more or less and excluding all older and better titles—including those tracts already deeded by said Wilkin as my attorney.”

As already stated, there was a deed executed by Gerding to Slausson for the same land, which, on its face was dated December 18, 1855. This deed was executed through Wilkin as attorney in fact for Gerding. It was followed by a deed made, on the 15th of October, 1856, by Gerding and Wilkin. This deed, after reciting that the parties just named “did, on or about the 14th day of June, one thousand, eight hundred and fifty-six, convey by deed, containing covenant of full warranty on the part of George F. Gerding and a quitclaim of all the right, title and interest of said Daniel F. Wilkin, to Charles Slausson forty-one thousand and five hundred acres of land in the county of Morgan, in said State of Tennessee, and whereas the said deed was antedated as of date December 18, 1855, in order to cover conveyances of said premises which said Slausson had before made under and by virtue of a former deed for said premises, and whereas the acknowledgment of said deed was antedated by consent of parties,” then continued:

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"Now, therefore, in consideration of the sum of one dollar, and as a final settlement between parties, we hereby remise, release, quitclaim, and convey all our right, title, and interest, claim or demand of, in, or to all the premises and lands mentioned and described in said deed, hereby ratifying and confirming the same, both as to the date and acknowledgment thereof except," etc; then follows an exception of land not here involved. This deed was registered in Morgan county on February 23, 1859. The deed dated December 18, 1855, was recorded in Morgan county on October 9, 1856. Both were recorded in Cumberland county January 19, 1915. Defendant contends that the recitals of this confirmatory deed, which was introduced by complainant, shows fully that the deed dated December 18, 1855, was really executed on or about June 14, 1856, and was antedated. The defendant also contends that this point is admitted in complainant's pleadings. But complainant contends that the confirmatory deed is subject to the construction that the deed introduced into the record, antedated as above mentioned, was intended to supply a former deed of that date conveying the same land which had been made by Wilkin as attorney in fact for Gerding, or by Gerding directly, and that such former deed truly bore the date of the antedated deed, and had been lost or mislaid; that this said former deed was the deed which was made to cover

conveyances which Slausson had previously made. On the existence of such former supposed lost or mislaid deed, or on the assumption that the deed, now dated December 18, 1855, was truly dated of the latter date, and that the statements in the complainant's bill are mere matters of mistaken construction, and thus matter of law not binding, it is argued for complainant that the exclusion clause in the deed from Gerding to Wilkin became fully operative, and so the land in controversy though described by entry and grant numbers in the said deed of Gerding to Wilkin, was not really conveyed thereby; that is to say, having been previously conveyed by Wilkin as attorney in fact for Gerding to Slausson, it was by the exclusion clause taken out of the conveying words of the said deed.

We shall consider the case on the assumptions stated.

The question must be determined, as we think, under our laws for the registration of deeds. It is to be remembered that the deed to supply which the deed of the apparent date of December 18, 1855, is assumed to have been executed was never registered at all, if there ever was such deed in existence, also that the deed dated December 18, 1855, was never registered even in Morgan county until eight months after the Gerding deed to Wilkin had been executed, and that such registration was at a time when the land in controversy was no longer a part of Morgan county, but was then a part of the new county of

Cumberland, and so the registration in Morgan county of this deed was wholly ineffective; was the same as if it had never been, so far as concerned the matter of notice. It must also be remembered that the Wilkin deed, as already stated (Gerding to Wilkin), was duly registered in Morgan county while the land in question was yet a part of that county.

So the question for discussion at this point is: On reading the exclusion clause in the deed of Gerding to Wilkin, would a purchaser under that chain of title be onerated with the duty of making inquiry or investigation for prior conveyances outside of and beyond the registration books provided by law for the recordation of the deeds and other evidences of title; that is, in the absence of proof of actual notice communicated from some other source, indicating the existence of an unrecorded deed?

This point, as related to exclusion clauses, has not previously arisen in our State, and we are not aware that it has been determined elsewhere.

In our judgment the question stated should be answered in the negative.

In *Wilkins v. McCorkle*, 112 Tenn., 688, 696-698, 80 S. W., 834, 835, it is said:

“Under our Code, while instruments that are required to be registered ‘have effect between the parties to the same, and their heirs and representatives, without registration,’ yet ‘as to other persons not having actual notice of them’ they have effect

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'only from the noting thereof for registration on the books of the register.' Shannon's Code, section 3749. When such instruments are registered, it is provided they 'shall be notice to all the world from the time they are noted for registration,' and they 'shall take effect from said time.' Id. section 3750. In case there are rival instruments, the instrument 'first registered, or noted for registration, shall have preference over one of earlier date, but noted for registration afterwards, unless it is proven in a court of equity, according to the rules of said court, that the party claiming under the subsequent instrument had full notice of the previous instrument.' Id. section 3751. 'Any of said instruments not so proved, or acknowledged, and registered, or noted for registration, shall be null and void as to existing and subsequent creditors of, or *bona-fide* purchasers from, the makers, without notice.' Id. section 3752.

"It is perceived," the opinion continues, "there are five leading propositions embraced in the foregoing sections: (1) That, as between the parties themselves and their heirs and representatives, such instruments take effect, and are good, without regard to registration; (2) that they also take effect and are equally good as to all persons who have actual notice of them from the date of such notice, except creditors; (3) that as to creditors (that is, of the vendor) they are inoperative, ineffective, and practically nonexistent until they are noted for registra-

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tion on the books of the register; (4) that as to all other persons (that is, all not embraced in the preceding classes) they are equally inoperative, ineffective, and nonexistent until so noted for registration; (5) that upon being so 'noted for registration,' they become at once 'notice to all the world,' and so effective as to all the world."

The point is noted in the opinion that some confusion had arisen from the use of the term "*bona-fide* purchasers," in the Code sections referred to, by reason of the technical meaning of that expression as used ordinarily in courts of chancery. Thereupon prior decisions of the court were cited and approved as holding, in substance, that the term was not to be understood in the technical sense mentioned, but simply as the equivalent of "purchasers without notice."

There is no reason apparent why the foregoing principles formulated in the sections of the Code, and repeated and construed in the decisions cited, should not protect the rights, and indicate the duties of all purchasers claiming under deeds which contain exclusion clauses as well as those claiming under deeds without such clauses. They are purchasers just the same; their muniments are deeds just the same. The certainty required for description of the thing conveyed is equally as important. The only distinction is that such a clause warns the purchaser that the vendor or maker of the instrument is not sure that he has the right to convey all of the land

embraced within the description, and that if there be any lands included within the bounds as to which there exists an older and better title, the vendor is not to be understood as conveying these, and so shall not be held liable on his warranties in case there shall subsequently be disclosed an older and better title. It is true, we think, that such older and better title may be shown to have been complete, at the date of the deed by proof of adverse possession for the statutory period, under color of title, also by twenty years' adverse possession without color of title, but within defined boundaries, so raising the presumption of a grant; also that the color of title prior to our Act of 1895, chapter 38, did not have to be registered. It follows that as to such older and better titles the purchaser could claim no protection under the registration laws; his security resting on his duty to explore the lands in person or by agent and ascertain the existence of any adverse possession. But these exceptions do not deprive the purchaser of the protection of the registration (or recording) laws in respect of cases which these laws are broad enough to cover; that is, deeds, and other muniments of title which the law requires to be registered or recorded on the books of the county register of deeds. These laws were dictated by, and give expression to, a great public policy, the policy of making land titles as certain as possible in order that men may repose with a sense of security in the ownership of their landed estates, be they great or small.

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The obvious duty, then, of one who purchases directly under a deed containing an exclusion clause is to explore the land for adverse possessions, and to search the public records for prior deeds or other instruments affecting the title. He takes the risk of whatever adequate investigation along these lines of inquiry would disclose. He is conclusively presumed to know whatever in such way could have been discovered. It may be shown against him also that he had actual notice, that is, that some one communicated to him the existence of a prior unregistered deed; but the burden of proving this would rest upon any one asserting the fact. In the absence of such proven actual notice, or notice by the record or registration books, or by actual adverse occupation of the lands, the purchaser, notwithstanding the exclusion clause, has the right in law to rest confidently upon his title.

He is supported, in the first place, by the presumption that the deed in fact conveys all of the land which it describes under its conveying words, notwithstanding an exclusion clause, and by the principle that the burden rests upon any one relying on such exclusion clause to prove that it covers some specific tract or tracts (*Iron and Coal Co. v. Schwoon*, *infra*, 124 Tenn., 209, 135 S. W., 785; *Bowman v. Bowman*, *infra*, 40 Tenn. (3 Head), 48; *Fowler v. Nixon*, *infra*, 54 Tenn. (7 Heisk.), 719; *Bleidorn v. Pilot Mt., etc., Co.*, *infra*, 89 Tenn., 204, 15 S. W., 737; *Wright v. Hurst*, 122 Tenn., 656, 127 S. W.,

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701); and if in addition to this he make the investigation indicated in the immediately preceding sentences, he may rest in security.

If, despite the failure of the indicated sources of notice to yield any knowledge of the existence of such prior conveyance, there be in fact, lying in the hands of some one somewhere, an unregistered deed, then that deed is, as to him, "inoperative, ineffective, and practically nonexistent." Compare *Campbell v. Ice & Coal Co.*, 126 Tenn., 530, 150 S. W., 427.

If this be true as to the immediate purchaser under a deed containing an exclusion clause, it must gather strength as time elapses and subsequent purchasers succeed each other, and must attain an invincible firmness when one purchases after the expiration of fifty years, as in the case of the defendant before us.

If it be true—and for the purposes of this inquiry we have assumed such to be the fact—if it be true that D. F. Wilkins had made the unregistered deed of December 18, 1855, as the agent and attorney in fact of George F. Gerding, or an unregistered deed of similar import bearing as its true date December 18, 1855, which the antedated deed was intended to supply, still the doctrine which we have announced must be held to control as to any purchaser from Wilkin who was not shown to have had actual notice of the existence of such deed. This would present only the ordinary case of one who has purported to convey land by an unregistered deed

to one person, and has subsequently made a conveyance of the same land to another who has first put his deed to record. The latter takes the title; it not being shown that he had actual notice of the prior unregistered deed. A deed unregistered is incomplete in law (though good between the immediate parties), and incapable of conveying the title as against subsequent purchasers not shown to have had actual notice, and also as against creditors of the vendor. The same principle, too, must necessarily control even when the deed formerly unregistered is afterwards registered, if before such belated registration the land has been conveyed by registered deed to one who is a *bona-fide* purchaser in the sense of the statute as already defined, since by such prior registered conveyance the title has passed by contract and by operation of law, and there is nothing at all left in the holder of the unregistered deed; that deed is but a husk, a dry shell. Its subsequent registration counts for naught. Indeed it has been authoritatively held that a *bona-fide* purchaser under a deed may convey to one who had knowledge of a prior equity, and yet such purchaser will obtain a good title, notwithstanding his knowledge. *Perkins v. Hays*, Cooke (3 Tenn.), 163. This conclusion, it is seen, is based on an immutable foundation. But, as a matter of fact, as already stated, the deed of December 18, 1855, was not registered in Morgan county until long after the land in question had been made a part of Cumberland county, and was not

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registered in the latter county until many years after the defendant had purchased the land, and indeed, not until after the present litigation had been commenced. It is true that deed was registered in Morgan county (October 9, 1856), before defendant purchased the land (November 18, 1909), and even before W. A. Henderson (year 1891, deed recorded February 3, 1892), the immediate vendee of Wilkin, purchased the land; but that is an immaterial circumstance, since an intending purchaser would not be bound to search the records of Morgan county after the first Monday in April, 1856, when the register's office in Cumberland county was opened, into which latter county, as we have before stated, the land had been transferred by the legislature of the State.

We are referred to *Land Co. v. Hilton*, 121 Tenn., 308, 120 S. W., 162, as inconsistent with the principle we have announced that a purchaser is not bound to make inquiry for unregistered deeds. That case does not apply. The points in judgment were different. It is true that it was apparently, on first blush, held in that case that an unrecorded deed may be validly referred to in a subsequent deed for purposes of description, but as a matter of fact the deed referred to was, as the opinion shows, a regularly registered deed. So the point in judgment was not as broad as the one just stated. The real point adjudged was that where the former deed is in fact a registered one, it need not be referred to as such, but a general reference by name of parties and date

will be sufficient. To hold broadly that a reference to an unregistered paper for description would be sufficient under our registration laws would, in large measure, nullify those laws in respect of the vital function which they were devised for; that is, notice to subsequent intending purchasers and to creditors. The description of the land conveyed is a vital part of the deed. To say that a deed is duly registered when one of its vital parts is blank is manifestly incorrect. The question is not the same as the one which arises when the description is "the tract of land on which I now live," the "tract known as Rose Hill farm," and the like. It is true these are references to matter *in pais* which must be ascertained by inquiry and investigation, just as metes and bounds must be; and they will yield true results to inquiry; they cannot be fabricated as unregistered deeds may be. Moreover, the registration laws are not so drawn as to require the recording of matters identifying description by such local reference, while they are drawn for the purpose of perpetuating written evidences. We do not doubt that a reference to an unregistered paper for description of the land conveyed may be good between the parties, but we are unable to see how such a description can be held good as against subsequent purchasers without actual notice, or as to creditors. Where will they go to seek the unregistered paper? How will they know it is genuine when a paper purporting to be applicable is found? The difficulties suggested by these ques-

tions furnish an ample answer to the contention that such a reference is good against subsequent innocent purchasers or attaching or levying creditors.

We repeat: An exclusion clause in a deed can be made effectual as to a subsequent innocent or *bona-fide* purchaser under the deed containing such exclusion clause only, aside from adverse possession, by showing a prior registered deed or other valid instrument purporting to dispose of the land or adverse possession. Differently stated, the exclusion clause is as to such *bona-fide* purchaser, or creditor, wholly inoperative unless satisfied in the manner just stated. A contrary holding or doctrine would be disastrous. Consider: One desiring to purchase land has an abstract made. This abstract shows that one of the deeds, in the chain of title, conveying a larger tract of which the subject of the proposed purchase is a part, contains an exclusion clause. The abstractor reports that an exhaustive search of the registration books shows no prior conveyance. Can the intending purchaser, after being satisfied there is no adverse possession, rest on this report and buy the land? If he be told that he cannot, but must institute an oral inquiry for some unrecorded paper, possibly made many years before, possibly still in existence, possibly lost, will he not be justified in giving up his enterprise? Will not the registration laws in such a case have failed to serve their purpose? Will not the policy of the State be to this extent set at naught? The rule is, as already stated, that not-

withstanding an exclusion clause, the deed *prima facie* in the absence of a description of the excluded land in the deed itself, conveys all that it describes. But any one who seeks to appropriate the benefit of the exclusion clause may, indeed must, if he would obtain the benefit, assume the burden of proving that it applies to some particular tract or parcel of land. The question then arises, By what principles shall he be guided in making this proof? Shall he be confined to recorded papers, or shall he be permitted to explore the world for an unrecorded instrument, lodged in some unknown crevice, hidden in some obscure corner, or forming part of the debris in some old loft, or garret, or waste heap of forgotten papers? There being, as stated, no published decision in our State on the point, the problem must be solved by a consideration of the general consequences that would attend the one or the other solution; and these may be stated and contrasted in a single sentence. If the proof can be made by such random search, all chains of land title in which appear deeds containing exclusion clauses are rendered uncertain and hence the titles unmarketable, and the registration laws are to that extent set at naught. If the other theory be the true one, such titles are marketable, and the registration laws efficiently perform the functions they were designed to perform.

What we have herein held upon the subject of the exclusion clauses in deeds is not in conflict with any of the cases cited in complainant's brief (viz., *Bowman v.*

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Bowman, 40 Tenn. [3 Head], 48; *Fowler v. Nixon*, 54 Tenn. [7 Heisk.], 719; *Bleidorn v. Pilot Mountain, etc., Co.* 89 Tenn., 204, 212, 213, 15 S. W., 737; *Iron & Coal Co. v. Schwoon*, v. 124 Tenn., 209, 135 S. W., 785; *East Tenn. Coal Co. v. Taylor*, 131 Tenn., 11, 16, 17, 173 S. W., 433; *Brier Hill Colliers Co. v. Gernt*, 131 Tenn., 542, 546, 175 S. W., 560) as in conflict with our present holding. The effect of the registration laws was not considered in any of them. In the case of *Iron & Coal Co. v. Schwoon*, the prior conveyances covered by the exclusion clause were simply mentioned (pages 210, 199, 200), and it was not stated whether they had been registered. However, one of the muniments referred to, the Thompson grant, was manifestly a recorded paper, as are all grants of the State. The same observation is true of *Bleidorn v. Pilot Mt., etc., Co.* In the case of *Brier Hill Collieries Co. v. Gernt*, it appears that the deed covering the excluded land was a prior registered conveyance. The case of *Northcut v. Church*, 135 Tenn., 541, 188 S. W., 220, cited on complainant's brief, has no bearing, being on a different question.

It is insisted by complainant that the decree, above referred to as part of his chain of title, purporting to vest the title to the land in Sarah Lord Kobbe, duly registered in Cumberland county July 3, 1873, was notice to defendant and its predecessors in title subsequent to D. F. Wilkin. Concede this, yet such notice was ineffective because that decree could only pass such title to Sarah Lord Kobbe as was possess-

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ed by William A. Kobbe, the defendant to that proceeding, in which proceeding the land was attached and sold as the property of the said William A. Kobbe. His title rested on a deed which was made to him by Gerding on October 8, 1866, which was never registered in Cumberland county. That deed was, of course, inferior to the prior deed to D. F. Wilkin made and registered in Morgan county while the land was a part of that country, on which defendant's title rests, in one of its lines.

But it is further insisted by complainant that his rights are superior because the decree referred to purported to transfer to William A. Kobbe the title of George F. Gerding. To this contention, however, there are two answers, each conclusive. The first is that that part of the decree was *coram non judice* and merely void. The land was attached, at the suit of Gerding, as the property of William A. Kobbe, supposed to have been acquired under the deed of October 8, 1866, made to him by Gerding, and so offered for sale and sold. There was no pleading that could justify a decree purporting to transfer any title of Gerding; that was not involved further than the fact that he had made the deed to William A. Kobbe. *Randolph v. Merchants' National Bank*, 9 Lea (77 Tenn.) 69; *Isham v. Sienknecht* (Tenn. Ch. App.), 59 S. W., 779; *Reynolds v. Stockton*, 140 U. S., 254, 266, 11 Sup. Ct., 773, 35 L. Ed., 464; 1 Black on Judgments, section 242. The decree and deed under it can convey only the land which was by the decree directed to

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be sold, 24 Cyc., 61, and authorities cited. But it is said this court, in the unreported case of *William Otto and others v. R. B. Cassell, Trustee, and others*, and *William Otto and others v. C. A. Quinn and others*, decided in 1913, without any written opinion, affirmed the decree of the chancellor, in which he held that the title passed "from the Gerdings" to Sarah Lord Kobbe, under the cross-bills in the Anderson county case above referred to, and that this should be followed under the rule *stare decisis*. It is not insisted that the particular tract, entry 1980, was involved in the Otto Case, or that there is here any question of *res adjudicata*; simply the rule *stare decisis*, as stated. It is unnecessary to consider what else was in that case, but that special ruling was evidently erroneous as shown by the reasons already stated. The rule *stare decisis* cannot be permitted to control, compelling the application of an unreported decision under such circumstances. When there has been a published opinion long relied on, and on faith of which important rights have been presumably based, that decision will be adhered to, even though erroneously decided at the time. The principles governing the subject are stated in *Wilkins v. Railroad*, 110 Tenn., 442, 455-461, 75 S. W., 1026.

The second answer above referred to is that Gerding had no title, having previously conveyed it to D. F. Wilkin by deed duly registered.

It is insisted by the complainant that the defendant is estopped to rely on the D. F. Wilkin title by the following facts:

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D. F. Wilkin conveyed to W. A. Henderson in the year 1891, by deed recorded in Cumberland county on February 3, 1892. On September 8, 1899, an original bill was filed in the chancery court of Cumberland county in which Harriman Land Company was complainant, and the Union Land, Coal & Coke Company, and W. A. Henderson and others were defendants, which involved the title to the land in controversy here, and other tracts. An amended and supplemental bill was filed in that cause April 2, 1901. The fifteenth tract described in that bill covered the larger portion of the land in controversy in the present case. In that bill it was alleged that Daniel F. Wilkin never claimed any title to that land for himself, but that he was a trustee for George F. Gerding; that Daniel F. Wilkin had by direction of Gerding executed a deed to Samuel E. Roberts for this land in the year 1856, and that this deed was lost without ever having been recorded. At the August term, 1902, of the Cumberland county chancery court W. A. Henderson was, by order of the court, transferred to the complainant's side of the record, on application of the complainants in that cause. It does not appear that he consented to this transfer, or the contrary. But on July 28, 1902, before this change from the defendant to the complainant side of the record was made, the parties to the cause made a settlement of the matters in controversy between them, at least as to entry No. 1980, which embraces the land in controversy in the case now before us. In effectuating this settlement they made an ex-

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change of deeds, by which Harriman Land Company conveyed entry No. 1980 to W. A. Henderson. The Harriman Land Company had been claiming entry No. 1980 by virtue of the deed, before referred to herein, made by George F. Gerding to Samuel E. Roberts June 12, 1856, and recorded in the register's office of Cumberland county August 12, 1873. By the deed made to W. A. Henderson by Harriman Land Company, the two conflicting titles, the Wilkin and the Roberts title, were brought together on July 28, 1902, and lodged in W. A. Henderson. Thus claiming to own both titles, W. A. Henderson conveyed the land to G. A. Schlicher by deed dated April 22, 1905, and recorded in the register's office of Cumberland county on July 13, 1906. Schlicher conveyed to John A. Shillito by deed dated July 9, 1906, and recorded on July 14, 1906. The title then runs through different deeds from John A. Shillito down to the defendant Cumberland Lumber Company, the last deed in defendant's chain being dated November 18, 1909, and registered April 1, 1910.

No reason appears why, after entry No. 1980 had been taken out of the case by the compromise deeds above referred to, in July, 1902, the Harriman Land Company should subsequently, in August of the same year, file its amended and supplemental bill making the charges with respect to the Wilkin deed which we have recited, and on which the complainants in the present bill rely for estoppel; and, particularly, no reason appears why W. A. Henderson should have

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permitted his name—if he did permit it—to be transferred to the complainant's side of the record of that case, and thus cast a cloud on the title he had derived from Wilkin. We can only surmise that as the Wilkin deed (Gerding to Wilkin, February, 1856) conveyed many other tracts, the allegations referred to were made by the Harriman Land Company with a view to recovering one or more of such other tracts. But at all events, no estoppel was thereby created in favor of the present complainant. Neither he nor any of his predecessors in the title were connected with that litigation, nor is it shown that they did any thing, or abstained from doing anything, by reason of these allegations, or that, prior to the present litigation, they ever knew that such allegations had been made. As to complainant it is a matter purely *res inter alios acta*. So there is lacking the requisite mutuality as a basis for estoppel. *Tate v. Tate*, 126 Tenn., 169, 214, 148 S. W., 1042; *Ross v. Cobb*, 9 Yerg. (17 Tenn.), 469. Even W. A. Henderson himself would not be estopped if he were defendant in the present case instead of the Cumberland Lumber Company, for the reasons already stated, and for the want of privity between him and the present complainant in respect of the Harriman Land Company litigation. At most the allegation could be used against him as evidence of an admission; but he would not be barred from showing he was mistaken, or from showing, as was done in the present case by the testimony of Mr. Wilkin, that these allegations were not true. *Singleton*

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v. *Ake*, 3 Humph. (22 Tenn.), 626; 16 Cyc., 685; Bigelow on Estoppel, sections 56-66, note 79. For a stronger reason the defendant lumber company, although it claims through Henderson as one of its predecessors in title, would not be estopped. To hold that the defendant would be estopped, even though Henderson were himself estopped by such matter, the court would have to approve, and rely upon, the manifestly unsound proposition that estoppels arising out of pleadings in cases lying outside of the chain of title would run with the title and be binding on all purchasers subsequently claiming through the person supposed to be estopped by the pleading. Such a rule would introduce unending confusion into real estate titles, and render their satisfactory investigation impossible. All the records of all the courts of the county embracing the land would have to be searched, and every pleading read in every case in which the person in question had been made a party. And even this would not suffice, since the records of the federal court having local jurisdiction would have to be explored for a possible pleading that would yield forth evidence of an estoppel.

The same reasons apply with even greater force against the contention that because W. A. Henderson was the attorney of Gerding in the Anderson county case (if he was in fact such attorney), he must have had knowledge of the unregistered deed made by Gerding to William A. Kobbe in October, 1866. This would not prevent him from lawfully acquiring

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the title of D. F. Wilkin under his prior registered deed; and, even if Henderson's knowledge of the unregistered deed of October, 1866, just referred to, was otherwise important, it would not be in the way of defendant's lawfully acquiring the title which Henderson obtained from D. F. Wilkin; and this is true whether defendant had knowledge of the unregistered deed of 1866 or not.

We have thus examined all of the complainant's contentions against the Wilkin title, and have found that none of them can be sustained, and therefore that defendant's claim under that chain is superior to complainant's chain under William A. Kobbe. The same conclusion must also be reached in respect of the Samuel E. Roberts chain under which also the defendant claims. This is apparent from what we have incidentally said in respect of this chain while considering the Wilkin chain and the William A. Kobbe chain. That is to say: We have already pointed out that, although the registration of the decree in the Anderson county case was had in Cumberland county prior to the registration of the deed made by George F. Gerding to Roberts, yet the deed on which the Anderson county decree was based, that is, the deed from George F. Gerding to William A. Kobbe, was never registered in Cumberland county at all, and, further, that the attempt in that decree to divest a supposed title out of George F. Gerding and vest it in Sarah Lord Kobbe was futile, and wholly without legal significance, and that the Roberts

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title was owned by the defendant lumber company, the two sources of title, the Wilkin title and the Roberts title having coalesced in W. A. Henderson, and having been thence passed on through various succeeding purchasers down to the defendant lumber company. Moreover, it is even true that the same reasons which sustain the conclusion as to the superiority of the Roberts title sustain the superiority of the Slausson title, as outstanding and superior to that claimed by complainant under the William A. Kobbe deed and the proceedings based on it in the Anderson chancery court; the Slausson deed having, though late, been registered in Cumberland county, and the William A. Kobbe deed never registered there; and the attempt to transfer a supposed title from Gerd- ing to William A. Kobbe by the decree of confirmation in the said Anderson county case having been wholly abortive for reasons already stated. So it is ap- parent that the complainant has no sort of legal claim to the land sued for.

It is unnecessary to consider the defense of adverse possession put forward by the defendant, the other grounds, really either of them, being sufficient to defeat the bill. Indeed we might have contented ourselves with a discussion of the Wilkin title, but the Roberts title and the Slausson title were so intermingled with it that the discussion of the one practically, though not necessarily involved a consideration of the other two.

It results that the decree of the chancellor dismiss- ing the bill must be affirmed, with costs.

CASEY-HEDGES CO. v. WALTER GATES.

*(Knoxville. September Term, 1917.)***MASTER AND SERVANT. Fellow servants. Injuries to servant. Defective appliances.**

Where cores are selected, inspected, and prepared by employees of another department, without supervision except the general supervision over both departments, a molder cannot recover for injuries from loaded defective cores coming to him, especially where he has an opportunity to inspect and select from the cores prepared.

Cases cited and approved: Bridge Co. v. Grizzle, 119 Tenn., 683; Morriss Bros. v. Bowers, 105 Tenn., 64; Bruce v. Beall, 99 Tenn., 304; Guthrie v. Railroad, 79 Tenn., 372; Griffin v. Parker, 129 Tenn., 446; Haakensen v. Burgess Sulphite Fiber Co., 76 N. H., 443; Leishman v. Union Iron Works, 148 Cal., 274; Beesley v. Wheeler, 103 Mich., 196; Dougherty v. Milliken, 163 N. Y., 527; Virginia Iron, etc., Co. v. Hamilton, 107 Tenn., 705; Coal Creek Mining Co. v. Davis, 90 Tenn., 711; Kehoe v. Allen, 92 Mich., 464; Colton v. Richards, 123 Mass., 484; Thompson v. Worcester, 184 Mass., 354; Hefferen v. Northern P. R. Co., 45 Minn., 471; Ross v. Walker, 139 Pa., 42; Prescott v. Ball Engine Co., 176 Pa., 459.

FROM HAMILTON

Appeal from the Circuit of Hamilton County.—
NATHAN L. BACHMAN, Judge.

SIZER, CHAMBLISS & CHAMBLISS, for appellants.

TATUM, THACH & LYNCH, for appellee.

Casey-Hedges Co. v. Gates.

MR. JUSTICE GREEN delivered the opinion of the Court.

Walter Gates recovered a judgment for \$1,500 against the Casey-Hedges Company for damages for personal injuries, which was affirmed by the court of civil appeals, and the case is before us on *certiorari* granted.

Gates was an experienced iron molder in the employ of the plaintiff in error, and the basis of his suit is alleged negligence of the plaintiff in error in furnishing him with defective appliances.

Plaintiff in error relies on his motion for a directed verdict, the disallowance of which he assigns as error in this court.

At the time he received his injuries the defendant in error was engaged in the casting of iron pipe. There was an explosion of the mold into which he and his assistant were pouring the melted iron, and by the force of the explosion this liquid was thrown onto the leg and foot of defendant in error, injuring him severely.

The mold for casting iron pipe comprises the lower part known as the "drag." The upper part of the mold is called the "cope." The cope fits upon the drag. Both are concave. In the cylinder thus formed the pipe is molded.

Within this mold before the liquid iron is poured therein is placed what is called the "core." This core is a tubular appliance whose outside circumfer-

ence is smaller than the inside circumference of the mold. When the metal is poured into the mold it forms around the core, and the hollow or interior of the pipe is thus made.

The core consists of an iron pipe called the arbor over which is spread a thin coating of damp sand. The arbor is perforated along its circumference, and each end of the arbor pipe is open. As molten iron cools it expels gases, and these gases escape through the sand covering the perforations into the arbor, and thus out either end of the arbor.

It is necessary to handle the cores with great care after they are prepared. If the sand drops from them, the melted iron will run through the perforations into the arbor, and the casting of pipe will be spoiled. Notwithstanding the care used in handling these cores, it frequently happens that some of the sand drops from them, and melted iron is thus allowed to run into the arbor. If sufficient iron runs into the arbor to stop it up, it then becomes what is called a "loaded arbor." If such an arbor is used in a core and then placed in a mold for the purpose of casting pipe, there will be no way for the gas from the melted iron to escape, and an explosion is likely to follow.

The testimony of Gates tends to show that the accident happened to him in the way just indicated; that a core was made with a loaded arbor, and that in making the particular cast after he and his assistant had poured the melted iron into the mold the end

of the arbor blew out, throwing the hot liquid upon his leg.

These cores are made, that is, the arbors are sand covered, by a machine, many of them each day in this foundry. There are a number of men engaged in this work, called "coremakers." They are not under the supervision of any particular superintendent or foreman. There is such an employee having general charge of all the workmen at the place.

The testimony of the defendant in error is that the molders were not supposed to inspect the interior of the cores furnished to them. Such cores were prepared as before stated and brought out to the molders on racks with several cores on each rack, and the molder had the selection. The molder would examine the outside of the core to see if they were properly covered with sand, but did not look at the ends to see if the interior of the arbors were obstructed or loaded.

It is insisted for the defendant in error that his injuries were caused by a defective core supplied to him, and that for these injuries thus inflicted his employer is liable.

The general rule, of course, is that an employer is bound to furnish to his employees safe appliances for the prosecution of their work. To this effect are all our cases. *Bridge Co. v. Grizzle*, 119 Tenn., 683, 109 S. W., 290; *Morriss Bros. v. Bowers*, 105 Tenn., 64, 58 S. W., 328; *Bruce v. Beall*, 99 Tenn.,

304, 41 S. W., 445; *Guthrie v. Railroad*, 79 Tenn. (11 Lea), 372, 47 Am. Rep., 286.

In all these cases, however, the master undertook to supply to his servants instrumentalities in a completed form, ready for use. As to such appliances the master is under obligation to furnish them in a safe condition.

The master may, however, delegate to his servants the duty of constructing their own instrumentalities of labor. In this event, if the instrumentalities are defectively constructed, such defect arises from the negligence of the servants themselves. If the master furnish suitable material for such construction and leaves the selection of the component parts and their adjustment to the discretion of the servants, unembarrassed by the supervision of any foreman or vice-principal, the master is not liable for an injury due to a defect in such construction or adjustment.

“If the master supplies suitable material for the construction of an appliance, which he is not obliged and has not undertaken to furnish in a completed state, and the workmen themselves construct it according to their own judgment, the master is not liable for the manner in which they used the materials thus supplied.” 2 Labatt, Mas. & Ser. (1 Ed.) section 614.

“The obligation of an employer to furnish his employees with safe appliances and a safe place of work does not impose upon him the duty of supplying instrumentalities in a completed form. When under

the terms of a contract of employment the employees are required to construct an instrumentality, the employers' duty is discharged by furnishing suitable materials with which it may be constructed; and he is not liable for an injury due to a defect in its construction or adjustment." 18 R. C. L., p. 596.

The doctrine thus stated finds frequent application in scaffold cases. Where the master undertakes to furnish the scaffold as a completed structure, he is liable for an injury resulting from defective construction. If, however, he directs the servants to build their own scaffold for the prosecution of their work and furnishes them suitable materials and leaves them unembarrassed in their selection of such materials, without supervision of a foreman, then he is not liable for an accident resulting from defective construction. *Griffin v. Parker*, 129 Tenn., 446, 164 S. W., 1142, L. R. A., 1917F, 497; *Haakensen v. Burgess Sulphite Fiber Co.*, 76 N. H., 443, 83 Atl., 804, Ann. Cas., 1913B, 1122, and note, where all the cases are collected.

This rule is applied to instrumentalities other than scaffolds or staging in *Leishman v. Union Iron Works*, 148 Cal., 274, 83 Pac., 30, 3 L. R. A. (N. S.), 500, 113 Am. St. Rep., 243, which was a case of an iron molder very similar to this one. See, also, *Beesley v. Wheeler*, 103 Mich., 196, 61 N. W., 658, 27 L. R. A., 266; *Dougherty v. Milliken*, 163 N. Y., 527, 57 N. E., 757, 79 Am. St. Rep., 608.

So we think that under the rule just announced the plaintiff in error was not liable for injuries resulting from the defective construction of this core.

It is true that the coremakers worked in a separate department from the molders, but they were all engaged in the same common employment under common supervision. They were undoubtedly fellow servants, since the departmental rule has not been applied in this jurisdiction except to railroad companies. *Virginia Iron, etc., Co. v. Hamilton*, 107 Tenn., 705, 65 S. W., 401; *Coal Creek Mining Co. v. Davis*, 90 Tenn., 711, 18 S. W., 387.

It is contended, however, that the plaintiff in error was under obligations to inspect the arbor iron for defects before it was used in the making of the core, and that this duty of inspection was nondelegable.

While our cases heretofore referred to recognize a continuing duty of inspection on the part of the master with respect to certain instrumentalities, there are exceptions to this rule. It is said not to be the master's duty to look for and "repair defects arising in the daily use of an appliance for which proper and suitable materials are supplied and which may be remedied by the workmen, and are not of a permanent character or requiring the help of skilled mechanics." 26 Cyc., 1138. It appears that it was the duty of the coremakers to examine the iron arbors to ascertain if these pipes were free from obstructions. Such obstructions were likely to occur in the use and plaintiff in error maintained a blacksmith

shop to which it was the duty of the coremakers to send these arbors if they needed cleaning out. They were likely to get loaded at any time, and the cleaning of them, in our opinion, was a mere detail of the service just as much as covering them with sand. To clean the arbors and to cover the arbors were alike incidents of construction of the cores.

In addition to this the coremakers were intrusted with the right of selection of the arbors which they used in making the cores. The greater part of the arbors returned to them from the molders would be clean and free from obstruction. That is to say, the master furnished to these coremakers an abundance of suitable material and left the selection to them. If under such circumstances they negligently selected defective material for use in making the cores, the master not undertaking any supervision of the work, such negligence was the negligence of fellow servants in the performance of their ordinary duties, for which the master is not liable in this suit of defendant in error.

The authorities abundantly sustain the proposition that a servant has no right to complain of the master's failure to inspect where safe tools, appliances, or materials are available, and the servant to whom the duty of selection is left makes a negligent choice.

This is undoubtedly true where the servants without supervision are undertaking from simple material to construct their own instrumentalities of labor. In such a case the selection is but part of the construc-

tion. To this effect is our own case of *Griffin v. Parker*, supra, also *Leishman v. Union Iron Works*, supra, and this is the extent of our ruling herein.

Many cases, however, hold this to be the rule as to completed instrumentalities or appliances ready for use, where a supply of safe tools and appliances is available, and the servant negligently selects improper and unsuitable instrumentalities. *Kehoe v. Allen*, 92 Mich., 464, 52 N. W., 740, 31 Am. St. Rep., 608; *Colton v. Richards*, 123 Mass., 484; *Thompson v. Worcester*, 184 Mass., 354, 68 N. E., 833; *Hefferen v. Northern P. R. Co.*, 45 Minn., 471, 48 N. W., 1, 526; *Ross v. Walker*, 139 Pa., 42, 21 Atl., 157, 159, 23 Am. St. Rep., 160; *Prescott v. Ball Engine Co.*, 176 Pa., 459, 35 Atl., 224, 53 Am. St. Rep., 683. See other cases collected in notes 1 L. R. A. (N. S.), 952. In some of these cases, though, the master might be exonerated on the simple-tool doctrine.

For the reasons indicated, we think that the motion for a directed verdict should have been sustained, and the judgment of the trial court and the court of civil appeals is accordingly reversed, and this suit dismissed.

CINCINNATI, N. O. & T. P. R. Co. v. ROY FORD.

(Knoxville. September Term, 1917.)

1. RAILROADS. Killing dog. Contributory negligence. Statute. "Highway."

Under Thompson's Shannon's Code, section 2853a, providing that it shall be unlawful for any person to allow a dog belonging to him to go upon a highway, etc., the owner of a female dog who allowed her to go upon the track of a railroad where she was killed was guilty of contributory negligence, and could not recover her value; the railroad being a "highway." (*Post*, pp. 506-509.)

Acts cited and construed: Acts 1901, ch. 50; Acts 1903, ch. 419; Acts 1907, ch. 32.

Cases cited and approved: Chattanooga Railway & Light Co. v. Bettis, 202 S. W., 70; Nashville, etc., R. Co. v. Davis, 78 S. W., 1050; Citizens' Rapid Transit Co. v. Dew, 100 Tenn., 317; Fink v. Evans, 95 Tenn., 413.

Codes cited and construed: Secs. 2853a, 1574-1576, 2853a2 (T.-S.).

2. ANIMALS. Dogs as property. Common law.

At common law, dogs were not considered property, the reason given being that they were base in their nature, and kept merely for whim and pleasure. (*Post*, pp. 509, 510.)

3. RAILROADS. Killing dog on track. Liability. Statute.

Thompson's Shannon's Code, sections 1574-1576, requiring railroads to keep the engineer, fireman, or other person on their locomotives always on the lookout ahead and, when any animal appears on the tracks, to sound the alarm whistle, put down the brakes, and employ every possible means to stop the train and prevent an accident, were not intended to be applied for the protection of an unregistered female dog running at large, declared a public nuisance by section 2853a2. (*Post*, p. 510.)

FROM HAMILTON.

Appeal from the Circuit Court of Hamilton County.
—NATHAN L. BACHMAN, Judge.

ALLISON, LYNCH & PHILLIPS, for plaintiff.

STANFIELD & BRIGHT, for defendant.

MR. JUSTICE GREEN delivered the opinion of the Court.

This suit was brought to recover the value of a female dog killed by a train of the plaintiff in error. There was a judgment below for \$25, which was affirmed by the court of civil appeals.

The dog was at large, and had not been registered and was killed while on the track of the railroad company. There is no evidence indicating a malicious or wanton killing.

Under these circumstances, we think the lower courts were in error, and that there can be no recovery in this case.

The provisions of chapter 50 of the Acts of 1901 and chapter 419 of the Acts of 1903 are brought forward into Thompson's Shannon's Code as follows:

"It shall be unlawful for any person to allow a dog belonging to him, or under his control, or that

may be habitually found on premises occupied by him, or immediately under his control, to go upon the premises of another, or upon a highway, or upon a public road or street; provided, however, that this act shall not apply to a dog, on a hunt or chase, or on the way to or from a hunt or chase, nor to a dog guarding or driving stock or on the way for that purpose, nor to a dog being moved from one place to another by a person owning or controlling a dog, but the foregoing exemptions shall not apply unless all damages done by dogs therein exempted, to the person or property of another, shall be paid or tendered to the person so damaged, or to his agent within thirty (30) days after the damage is done." Thompson's Shannon's Code, section 2853a.

This statute was passed for the protection of persons and property upon highways, roads, and streets of the State, as well as upon the private property of others.

It is well settled that railroads are highways. 33 Cyc., 37.

In addition to the use of such highways by trains, section men, trackwalkers, and persons intending to become passengers frequently pass along railroad tracks in such a way as to be exposed to dogs that may go thereupon. The statute was designed to keep loose dogs away from such places, and was for the protection of such premises.

We have recently suggested in the case of *Chattanooga Railway & Light Co. v. Bettis*, 139 Tenn., 332,

202 S. W., 70, that a plaintiff, who violated a statute intended for the protection of the defendant he was suing, was guilty of contributory negligence. We think that such is the law; and, inasmuch as the statute above quoted was intended for the protection of railroads as highways of the State to keep dogs off the right of way, the plaintiff, who allowed his dog to go upon such highway unlawfully, must be held to be guilty of contributory negligence barring his recovery, if this suit be treated as one under the common law.

If the action be considered as one brought for a violation of the statutory precautions (Thompson's Shannon's Code, sections 1574-1576), requiring railroad companies to keep the engineer, fireman, or some other person upon their locomotives always upon the lookout ahead, and, when any person, animals, or other obstruction appears upon the road, to sound the alarm whistle, put down the brakes, and employ every possible means to stop the train and prevent an accident, if the suit be treated as one for breach of this statute, recovery must be denied by reason of the provisions of chapter 32 of the Acts of 1907 as follows:

"The running at large of female dogs, not registered as hereinafter provided, is hereby declared to be a public nuisance, and that all persons owning or keeping any female dog three months old or over in this State, are hereby required to report same for registration to the circuit court clerk of the county in which the female dog is kept." Thompson's Shannon's Code, section 2853a2.

The object of our statutes heretofore referred to were to prevent injuries to persons, animals, or other property on the tracks of railroad companies, and also to prevent injuries to passengers on the railroad trains by reason of collisions with such obstructions.

A collision with an ordinary dog would not menace the safety of the passengers on a train, and there is no reason to observe the statutory precautions for this reason. On a like ground it has been held unnecessary to take statutory precautions to avoid a collision with a goose. *Nashville, etc., R. Co. v. Davis* (Tenn.), 78 S. W., 1050.

In *Citizens' Rapid Transit Co. v. Dew*, 100 Tenn., 317, 45 S. W., 790, 40 L. R. A., 518, 66 Am. St. Rep., 754, this court held that a dog was property, and there might be a recovery for its negligent killing by a street railway company.

In *Fink v. Evans*, 95 Tenn., 413, 32 S. W., 307, the court held that the statutory precautions must be observed with reference to dogs on railroad tracks.

Both the cases just referred to, however, were decided prior to the act of 1907.

At common law dogs were not considered property, the reason given being that they were base in their nature, and kept merely for whim and pleasure. *Citizens Rapid Transit Co. v. Dew*, supra.

While the act of 1907 does not deny that dogs are property, yet in terms it declares that an unregistered female dog, when at large, is a public nuisance.

We cannot think that it was ever intended that the rigid requirements of sections 1574-1576 of Thompson's Shannon's Code with reference to the duties of railroad companies as to obstructions on their tracks were intended to be applied for the protection of a public nuisance.

This court has in repeated decisions declined to extend these statutory provisions for the protection of employees of the railroad companies. Certainly these outlawed dogs cannot be included as beneficiaries of such statutes.

The judgments of the lower courts will be reversed, and this suit dismissed.

WM. J. OLIVER MFG. CO. v. THOMAS SLIMP.*(Knoxville. September Term, 1917.)***1. APPEAL AND ERROR. Wayside bill of exceptions. Motion for directed verdict.**

A wayside bill of exceptions may be taken, preserving the action of the trial judge in overruling a motion for directed verdict and a motion for new trial based thereon, and errors may be assigned on appeal upon such action, although the jury failed to agree upon and report a verdict. (*Post*, p. 302.)

Cases cited and approved: *King v. Miller*, 67 Tenn., 382; *Railroad v. Conley*, 78 Tenn., 531; *Jenkins v. Hankins*, 98 Tenn., 548; *State v. Perry*, 63 Tenn., 438; *Railroad v. Higgins*, 85 Tenn., 620; *Railroad v. Scott*, 87 Tenn., 494; *Seymour v. Railroad*, 117 Tenn., 98; *Barnes v. Noel*, 131 Tenn., 127; *Bostwick v. Thomas*, 137 Tenn., 99; *Construction Co. v. Pundt*, 136 Tenn., 328.

Code cited and construed: Secs. 4851, 4852 (S.).

2. TRIAL. Refusing directed verdict. Waiver of errors.

Error, if any, in overruling motion for directed verdict is not waived by failure to except to a subsequent order restoring the case to the docket for retrial. (*Post*, p. 302.)

3. APPEAL AND ERROR. Motion for new trial. Contents and scope.

Where the judge on first trial denied a motion for directed verdict, and the jury failed to agree, and he then denied motion for new trial on the ground of error in denying directed verdict, it was not necessary for defendant in his motion for new trial at the last trial to include the failure of the trial judge to award a new trial at the first trial. (*Post*, pp. 302, 303.)

FROM KNOX.

Appeal from the Circuit Court of Knox County.—
VON A. HUFFAKER, Judge.

WRIGHT, JONES & SAXTON and A. Y. BURROWS, for
plaintiff.

L. D. SMITH and J. C. WILBURN, for defendant.

MR. JUSTICE LANSDEN delivered the opinion of the
Court.

This is an action for personal injuries. There was a trial in which the jury could not reach an agreement, and a mistrial was entered and the case reinstated upon the docket. At a subsequent term another trial was had, and the jury rendered a verdict in favor of plaintiff for \$2,000. Judgment was entered upon this verdict, and an appeal was taken to the court of civil appeals, in which court the judgment of the circuit court was affirmed.

The procedure of the first trial was as follows:

At the close of plaintiff's evidence defendant moved for a directed verdict, and at the close of all the evidence defendant made a like motion. Both of said motions were overruled by the trial judge at the time. The jury reported that it could not agree upon a ver-

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dict and an order of mistrial was entered and the case restored to the docket for another trial. There was no exception to this order of the court. Subsequently the defendant made its motion for a new trial, and assigned as grounds therefor the action of the trial judge in overruling its two motions for a directed verdict. The trial judge overruled the motion for a new trial. Defendant preserved a wayside bill of exceptions, which was signed and sealed by the judge and made a part of the record in the case.

At a succeeding term the case was called for trial, and at the conclusion of plaintiff's evidence defendant made a motion for directed verdict, and at the conclusion of all the evidence a like motion was made. These motions were overruled. The jury returned a verdict in favor of the plaintiff for \$2,000, and defendant made a motion for a new trial, assigning as grounds therefor the action of the trial judge in overruling its motions for a directed verdict. There was no complaint in this motion of the action of the trial judge in overruling the motions for a directed verdict in the previous trial.

The question is made here for plaintiff that defendant is not in a position to have this court consider the evidence contained in the wayside bill of exceptions, because the judgment in the first trial was not a final one from which an appeal could be taken, and because in the second trial, in which there was a final judgment, no complaint was made in the motion for new trial of the action of the trial judge in overruling

the motions for a directed verdict made in the first trial.

The act of 1875, carried into Shannon's Code at sections 4851, 4852, does not provide specifically for the facts of this case. These sections are as follows:

"4851. Where a motion for a new trial shall be granted or refused, either party may except to the decision of the court, and may reduce to writing the reasons offered for said new trial, together with the substance of the evidence in the case, and also the decision of the court on said motion; and it shall be the duty of the judge, before whom such motion is made, to allow and sign the same; and such bill of exceptions shall be a part of the record in the case.

"4852. It shall be lawful for the appellant in such case to assign for error that the judges in the court below improperly granted or refused a new trial therein, and the supreme court shall have power to grant new trials, or to correct any errors of the circuit court in granting or refusing same."

This act was passed before the practice of peremptory instructions was adopted in this State. It was construed soon after being passed in *King v. Miller*, 8 Baxt., 382; *Railroad v. Conley*, 10 Lea, 531; *Jenkins v. Hankins*, 98 Tenn., 548, 41 S. W., 1028; *State v. Perry*, 4 Baxt., 438; *Railroad v. Higgins*, 85 Tenn., 620, 4 S. W., 47; *Railroad v. Scott*, 87 Tenn., 494, 11 S. W., 317. In speaking of the act with reference to the practice then in force, the court said that it was intended to preserve any proper advantage obtained

by a verdict which had been erroneously set aside by the circuit judge for the benefit of the one in whose favor the verdict was rendered. This, of course, is true when understood in the light of the practice then prevailing.

But subsequently the practice of directed verdicts by the court, when the evidence introduced, considered as a whole, presents only a question of law for the court and not a disputed question of fact for the jury, was adopted. The question of law in such cases cannot exist apart from the evidence in the case, and it was early held that a motion for a new trial was necessary in order to review in this court the action of a trial judge in granting or overruling motions for directed verdicts. *Seymour v. Railroad*, 117 Tenn., 98, 98 S. W. 174. And later held in *Barnes v. Noel*, 131 Tenn., 127, 174 S. W., 276, that a wayside bill of exceptions can be taken to preserve the action of the trial judge on the first trial in overruling a motion for a directed verdict, and errors could be assigned in this court upon such action. Following this case, *Bostwick v. Thomas*, 137 Tenn., 99, 191 S. W., 968, held that a motion for a new trial was necessary where the trial judge overruled a motion for peremptory instructions on the first trial, but later, on a motion for new trial, set aside the verdict, and sustained the motion for directed verdict. In *Construction Co. v. Pundt*, 136 Tenn., 328, 189 S. W., 686, it was held that a successful plaintiff might take a wayside bill of exceptions to the action of a trial judge in granting

defendant a new trial and assign errors upon such action in this court, although the subsequent trial resulted in plaintiff's favor.

From these cases we think it is clear that a wayside bill of exceptions may be taken preserving the action of the trial judge in overruling a motion for a directed verdict and a motion for a new trial based thereon, and errors assigned in this court upon such action, although the jury failed to agree upon and report a verdict in the case. If the motion for directed verdict is well taken when made, either at the close of plaintiff's testimony or at the close of all the testimony, the effect of such a motion is to end the suit before it is submitted to the jury. The fact that the jury, when the case is submitted to it, fails to reach a verdict can in no wise deprive defendant of the benefit of his motion for a directed verdict. Nor do we think that a failure to except to a subsequent order restoring the case to the docket for retrial is a waiver of the motions for a directed verdict. No good purpose could be served by excepting to such an order, inasmuch as the trial judge had previously overruled the motions for directed verdict and new trial. The regular and ordinary course or procedure in the trial court required that the case be restored to the docket for retrial after the judge's action upon the motions.

It was not necessary for defendant to include in his motion for new trial at the last trial the failure of the trial judge to award a new trial upon the first trial. The cases cited, *supra*, show that the assignments in

this court are predicated upon the alleged errors shown by the wayside bill of exceptions. No error could be predicated upon subsequent proceedings that would affect errors alleged in the first proceedings. If the motion for a new trial shown upon the bill of exceptions preserved to the second trial should have been granted, it would not affect the errors alleged to exist as a result of the first trial. What was done during the first trial was beyond the control of the judge, and nothing which counsel or the court could do could change it. We think the course of practice followed in the court below was the correct one in cases like this.

The court of appeals pretermitted a decision upon the question of practice herein discussed, and affirmed the case upon the merits. We have examined the record and concur in the action of that court and the trial court.

Affirmed.

CITY OF BRISTOL *et al.* v. WM. H. BOSTWICK *et al.*

(Knoxville. September Term, 1917.)

1. MUNICIPAL CORPORATIONS. Public buildings. Bonds of contractors. Right to sue.

Where a contractor on a public building gave a bond securing performance and also payment of materialmen and laborers, and he defaulted in both respects, the city could sue on its own claim for the additional cost of completion, and also in behalf of the laborers and materialmen whose claims were unpaid. (*Post*, pp. 309, 310.)

Acts cited and construed: Acts 1915, ch. 192; Acts 1899, ch. 182.

Cases cited and approved: Perkins Oil Co. v. Eberhart, 107 Tenn., 409; Knight & Jillson Co. v. Castle, 27 L. R. A. (N. S.), 573.

2. MUNICIPAL CORPORATIONS. Public buildings. Bonds of contractors.

Where contractor on a public building executed a bond for performance and on his telegraphic request, after advice of the city attorney, the surety by wire consented to insert the words, "and pay for all materials and labor," as required by Acts 1899, chapter 182, such addition became a part of the contract, and the bond validity secured both performance and payment for materials and labor. (*Post*, pp. 310-313.)

3. CONTRACTS. Construction.

It is the duty of the court primarily to construe every contract to effectuate the intention of the parties, though it may be necessary to ignore apparently inconsistent language. (*Post*, pp. 310-313.)

Cases cited and approved: Hardison v. Yeaman, 115 Tenn., 639; Equitable Surety Co. v. U. S., for Use, etc., 234 U. S., 448.

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4. MUNICIPAL CORPORATIONS. Public buildings. Bonds of contractors.

Mere fact that a contractor's bond, securing both performance, under Acts 1915, chapter 192, and also payment for labor and materials, under Acts 1899, chapter 182, was in a penalty larger than that required by the act of 1899 did not indicate that the parties were unmindful of the latter statute. (*Post*, pp. 313, 314.)

5. MUNICIPAL CORPORATIONS. Public buildings. Contractor's bonds. Liens of laborers. Time to file.

Where contractor on public building was enjoined from continuing contract, filing of labor and material claims within thirty days from such injunction was sufficient compliance with Acts 1899, chapter 182, section 4, requiring such claims to be filed within thirty days after completion of the contract. (*Post*, pp. 314, 315.)

Case cited and approved: *Basham v. Toors*, 51 Ark., 309.

Code cited and construed: Sec. 3540 (T.S.).

6. PLEADING. Demurrer, Effect.

All averments of the petition must be taken as true on demurrer. (*Post*, p. 316.)

7. MUNICIPAL CORPORATIONS. Public buildings. Contractor's bonds. Right to sue.

Though the city had in its hands and due the contractor more than enough money to pay, all labor and material claims, its suit on the contractor's bond, securing both performance and payment of claims, setting up his abandonment of the contract and the additional cost of completion and the liens and claims of labor and materialmen, was not premature. (*Post*, p. 316.)

8. MUNICIPAL CORPORATIONS. Public buildings. Contractor's bonds. Actions. Right to sue.

Where contractor gave single bond securing performance and also payment of labor and material claims and the city sued the surety for the additional cost of completion after the contractor abandoned the work, also setting up the claims of materialmen and laborers, demurrers to the separate petitions of the various

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laborers and materialmen should have been sustained, since the bill was not one of interpleader nor a general creditor's suit. (*Post*, pp. 316, 317.)

9. MUNICIPAL CORPORATIONS. Public buildings. Actions. Questions for jury.

Where the city sued on a contractor's bond for his failure to complete the building, it was for the jury whether the city could recover liquidated damages for failure to complete the building. (*Post*, pp. 317, 318.)

FROM SULLIVAN.

Appeal from the Chancery Court of Sullivan County.—HAL H. HAYNES, Chancellor.

ST. JOHN & GORE, for City of Bristol.

CHARLES C. TRABUE and ST. JOHN & GORE, for E. & N. Lumber & Mfg. Co.

HENRY ROBERTS, for Henry Hayes.

J. H. BUNDREN, for Trussed Concrete Steel Co.

J. CARL LAMBDIN and RUFUS M. HICKEY, for Citizens' Savings Bank & Trust Co.

H. T. CAMPBELL, for Mitchell-Powers Hardware Co.

PARK & PARK, CHAS. T. CATES, JR., and Wm. M. HALL, for Wm. H. Bostwick and U. S. Fidelity & Guar. Co.

HEAZEL & CAMBLOS, for Kingsport Brick Corporation.

O. L. WHITE, for S. B. White.

MR. JUSTICE GREEN delivered the opinion of the Court.

This bill was filed by the city of Bristol and the city board of high school commissioners against William H. Bostwick, the contractor who had undertaken to erect a new high school building for the city, and against the United States Fidelity & Guaranty Company, surety on Bostwick's bond, and against several laborers and materialmen.

The bill averred that, in pursuance of chapter 192, of the Acts of 1915, which authorized the city of Bristol to erect a high school and issue bonds for that purpose, the high school commissioners created by the act had entered into a contract with Bostwick, whereby he was to erect the said building at a contract price of \$48,000. The building was to be completed in the fall of 1916. It was not so completed, and in March, 1917, it was alleged that Bostwick abandoned the job. It was averred that he had executed the bond heretofore referred to, which will be more particularly mentioned later, and that this bond was conditioned to pay for all labor and materials furnished, as well as for the indemnity of the city of Bristol. It was stated in the bill that there were numerous laborers and materialmen who

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had filed claims with the high school commissioners, as provided by chapter 182 of the Acts of 1899, and that there were other laborers and materialmen whose claims would be filed in due season, and a recovery on the bond was sought for the benefit of such laborers and materialmen. The bill also sought a recovery against the surety of liquidated damages stipulated in the contract for the benefit of the city for the delay in completing the school building. It appeared from the allegations of the bill that a sum of money was still in the hands of the city, not yet paid out on account of the contract, and the city declared its willingness to appropriate this fund as the court might decree according to the equities of the case. The bill was thus exhibited both for the city and on behalf of the laborers and materialmen to recover from the bondsman the amount that might be due after proper application of the funds retained and in the hands of the city. The city's claims were more fully set out in an amended bill that was later filed.

Demurrers were interposed by the guaranty company and by the assignee of the contractor. Various laborers and materialmen came into the suit, some by petition, some by cross-bill, and another by the consolidation of an independent suit with the case at bar.

The grounds of the surety's demurrer, in most of which the assignee of the contractor has joined, are too numerous to permit of detailed discussion in a

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judicial opinion. Three or four general questions are raised, and in disposing of such questions the reasons of our ruling on each ground of the demurrer will be apparent. The chancellor overruled the demurrers *in toto*, and the surety and the contractor's assignee have appealed.

The first question made is upon the right of the city of Bristol and its high school commissioners to bring this suit. It is said that this is not a bill of interpleader, and, inasmuch as the city cannot be held responsible for these claims of laborers and materialmen, it has no right to bring a suit of the character which a property owner may bring when his property is threatened with the liens of subcontractors. *Perkins Oil Co. v. Eberhart*, 107 Tenn., 409, 64 S. W., 760. Both of these objections are doubtless well taken.

However, the fact remains that the city has a right to bring suit on its own claim, and we think there can be no doubt that it has a right to bring suit in behalf of the laborers and materialmen if these parties are protected by the bond which the surety company executed. The bond runs in the name of the city, and though it be for the benefit of other parties according to the best practice, an action is properly brought in the name of the nominal party for the use of the real beneficiary.

It seems never to have been doubted that the obligee of such bonds might bring a suit for the benefit of laborers and materialmen intended to be protected by the bond. The serious question has

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been whether such third parties had a right themselves to sue in the absence of statutory authority. This is a question on which the courts are divided. It is not doubted, however, in any jurisdiction where common-law practice prevails, that the obligee of a bond given to secure laborers on public works may bring suit for the use of such laborers. Many cases are collected and discussed in a note to *Knight & Jillson Co. v. Castle*, as reported in 27 L. R. A. (N. S.), 573. See concluding paragraph of note on page 601.

It is next contended for the surety that the bond sued on is not a statutory bond which secures the claims of laborers and materialmen, but a bond given only for the indemnity or protection of the city of Bristol. It is accordingly urged that neither the subcontractors, nor the city suing for them, can have any right of action on the bond for labor and material furnished. *Hardison v. Yeaman*, 115 Tenn., 639, 91 S. W., 1111.

This bond as first executed was a mere indemnity bond for the protection of the city of Bristol, with certain restrictive clauses. Such a bond was required by chapter 192 of the Acts of 1915, which authorized the city to construct this building.

Before the bond was accepted by the city, however, its attorney advised that there be inserted therein a clause protecting laborers and materialmen, as required by chapter 182 of the Acts of 1899. Accordingly a telegram was sent by the contractor to the

home office of the guaranty company in the following language:

"City attorney of Bristol wants inserted in bond executed for me to building commission, April 25th, page two, line three after word fulfilled, following, quote. And pay for all materials and labor used in said contract in lawful money of the United States. Being language required by chapter 182, Acts 1899. See Hardison against Yeaman, one hundred and fifteen Tennessee, page six thirty-nine. Wire authority to W. G. Sheen and Co., here to insert clause."

To this telegram the guaranty company replied:

"Upon request of William H. Bostwick, insert in bond number two five five three five four dash sixteen on page two line three after word fulfilled, the following, and pay for all materials and labor used in said contract in lawful money of the United States."

Sheen & Co., the local agents of the guaranty company, inserted the words authorized in the bond. These are the exact words required by chapter 182 of the Acts of 1899, which act makes it the duty of those who let contracts for any public building to take a bond so conditioned for the protection of laborers and materialmen.

The telegrams quoted are just as much a part of the contract entered into by the Guaranty Company as is the printed form which it executed first. The company was asked to make a bond which would comply with the provisions of the Acts of 1899, and

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the very language of the act was authorized by the company to be inserted in the bond already sent down. The attention of the company was called to the statute and to the decision of this court construing the statute, and it is idle to say that it was not intended by the parties to make the bond include the requirements of said statute.

When this bond was taken, there were two statutes affecting the duties of the high school commissioners of Bristol in the premises. The act of 1915 required them to take a bond for the indemnity of the city; the act of 1899 required them to take a bond for the protection of the laborers and materialmen.

There can be no objection fairly urged to the attempt to take one bond embodying the provisions of both statutes. The act of Congress respecting contracts for public buildings generally, and the act of Congress respecting contracts for public buildings in the District of Columbia, both require bonds for the protection of the government and bonds for the protection of subcontractors. It has been repeatedly held by the lower federal courts, and finally held by the United States supreme court, that one bond may be made to protect both the subcontractor and the government, that there is no obstacle to the assumption by a surety of such a dual obligation, and that such obligation will be enforced in favor of the several beneficiaries according to their respective rights. *Equitable Surety Co. v. U. S., for Use, etc.*,

234 U. S., 448, 34 Sup. Ct., 803, 58 L. Ed., 1394, and cases therein reviewed.

We are accordingly of opinion that the surety here intended to execute a bond which would comply with the provisions both of the act of 1899 and of the act of 1915, the bond protecting laborers and materialmen as well as the city of Bristol. It was so designed by the parties, and it is the duty of the court primarily to construe every contract to effectuate the intention of those contracting. This will be done even though it be necessary to ignore certain apparently inconsistent language contained in the instrument.

The circumstance that the bond was in a penalty larger than that required by the act of 1899 does not indicate that the parties were unmindful of that statute. The bond, being intended to comply with the provisions of the act of 1915 as well as the act of 1899, would naturally be in a larger sum than compliance with the earlier act alone would have required.

It is again insisted that the claims of these materialmen and laborers cannot be allowed because seasonable notice was not given by them to the proper authority, as required by the act of 1899.

Section 4 of said act provides:

“That the laborer or furnisher of materials, to secure advantage of this act, shall file with the public officer who has charge of the letting of any contract, an itemized statement of the amount owed

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by the contractor for the materials and labor used, within thirty days after the contract is completed."

It is averred in the bill, with respect to the claims of those subcontractors for whom suit is brought, that notice was filed with the officers having this contract in charge, as required by law, within thirty days after the contractor abandoned work on this building.

It appears that in another litigation a receiver was appointed for this contractor, and he was enjoined by the court from further proceeding with any of his contracts, including the one at Bristol, and work there was accordingly abandoned by him. Within thirty days from this time, according to the averments of the bill, itemized statements of these claims were duly filed by certain laborers and materialmen mentioned.

We think such a filing of these statements is a compliance with the provisions of the statute. The statutory provision is that the itemized statements shall be filed "within thirty days after the contract is completed." The contract referred to is the contract between the principal contractor and the officers having the public work in charge.

When the principal contractor abandons the work, as when his affairs are placed in the hands of a receiver, so far as he is concerned, he has terminated his contract. He has completed all the work he intends to do thereunder, and for the purpose of filing laborers' claims such a contract is completed.

Another construction would defeat the purpose of the statute in every case of contractor's default.

The act of 1899, in its provision for notice, differs from our mechanic's lien statute. The latter requires that the notice of the subcontractor be served within thirty days after the building is completed, or within thirty days after "the contract of such laborer, mechanic, or workman, shall expire," etc. Thompson's Shannon's Code, section 3540. Under the act of 1899, there is no authority for laborers and materialmen serving notice of their claims after completion of the building, unless that event marks the completion of the principal contract. Nor have such laborers and materialmen an opportunity to secure their demands by giving notice within thirty days from the expiration of their own contracts. Notice must be given within thirty days from completion of the principal contract, not from completion of the subcontract.

So we must hold that notice given within thirty days from the principal contractor's default perfects the subcontractor's claim on the bond under the act of 1899. This is the only chance of the subcontractor to obtain the benefit of a statute peculiarly designed for his protection under just such conditions.

See *Basham v. Toors*, 51 Ark., 309, 11 S. W., 282, construing provision of mechanic's lien statute as to notice somewhat similar to such provision in Act of 1899.

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The city of Bristol made an allegation of compliance with the statute for the subcontractors in whose behalf it sued. Other subcontractors who came into the case later alleged compliance with the statute on their own behalf. All these averments must, of course, be taken as true on demurrer.

It is also urged by the surety that this proceeding on the part of the city was premature. The ground of the objection is that it appeared from the original bill that the city had enough funds in its hands to pay all claims and something over, and that it did not appear that there would be any deficiency or lack of funds to pay subcontractors. This construction of the bill is not sound, however, if the city should be allowed anything like so much as it claims in the way of liquidated damages. In the latter event, there would be a very considerable shortage, manifestly.

Moreover, in the bond executed by it, the guaranty company limited the time in which an action might be brought to April 25, 1917, and the bill herein was filed April 13, 1917. It is not necessary to discuss the validity of this stipulation in the bond. Inasmuch, however, as such a stipulation is therein contained, the guaranty company is not in a condition to urge prematurity and charge undue haste against the city.

The guaranty company also insists that the laborers and materialmen had no reason to file petitions or cross-bills or other pleadings seeking affirmative

relief in this case, and it demurred to these pleadings on this ground.

We think this contention is well made as to those subcontractors for whose benefit the suit was brought and whose claims were properly set out in the bill. As said before, this is not a bill of interpleader nor a general creditor's suit nor a property owner's suit to have liens determined and declared. It is merely a suit by the city, a *quasi* trustee, for the benefit of itself and for certain laborers and material-men. Under no other theory could the bill be maintained so far as has been suggested to the court.

These subcontractors might, in the first instance, have brought independent suits if they so desired under the statute, but there was no occasion for them coming in this case by petition or cross-bill. This is true as to those in whose behalf suit had been brought by the city and as to whose claims necessary allegations had been made in the city's bill. It follows, therefore, that the demurrers to these petitions and cross-bills should have been sustained except as to those parties who had not filed notice of their claims prior to the bill and whose demands were not included in the bill.

Under the terms of the contract the chancellor was correct in overruling the demurrer challenging the city's right to sue for liquidated damages, on account of the delay in the completion of the building. This is a matter for proof, and should be determined on the remand.

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Except as indicated herein, the chancellor's decree will be affirmed. The costs of this court will be divided between the appellants. The costs below will be adjudged by the chancellor, who will tax those filing unnecessary pleadings, as above indicated, with the costs thereof.

JAMES McMILLAN v. CITY OF KNOXVILLE.

(Knoxville. September Term, 1917.)

1. **LICENSES. Nature of "license." Occupation tax.**

A "license," in its truer sense is issued under the police power, not for revenue, but for regulation, while a license may be issued on payment of an "occupation tax" levied under Constitution article 2, section 28, conferring power to tax privileges, revenue being its primary object, though regulation may be incidental; power exercised in the first case being to license and in the other to tax and license. (*Post*, pp. 323, 324.)

Acts cited and construed: Acts 1917, ch. 78.

Constitution cited and construed: Art. 2, sec. 28.

2. **LICENSES. Nature of "occupation tax."**

An "occupation tax" is levied primarily for revenue, and in instances for regulation incidentally. (*Post*, p. 324.)

Case cited and approved: Mayor of Nashville v. Linck, 80 Tenn., 507.

3. **LICENSES. Employment agencies. Statutes. Repeal.**

It was competent for the legislature to provide a regulatory license for and also an occupation tax on employment agencies, the two not being inconsistent or impringing on each other; and hence Pub. Acts 1917, chapter 78, providing for the regulation and supervision of "employment agencies," and requiring one engaging in such business to pay a fee and obtain a license, did not repeal Pub. Acts 1917, chapter 70, taxing the business of emigrant agents. (*Post*, p. 324.)

4. **CONSTITUTIONAL LAW. Licenses. Occupations. Amendment.**

It was competent for the legislature to add to whatever regulation was created in the imposition of a privilege or occupation tax on employment agencies under Pub. Acts 1915, chapter 101, and Pub. Acts 1917, chapter 70, by providing for more detailed policing regulation thereof in Pub. Acts 1917, chapter 78. (*Post*, p. 325.)

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5. LICENSES. Nature of fee. Distinction from occupation tax.

A true license fee, as contradistinguished from an occupation tax, should be fixed to cover the expense of issuing it, the services of officers and other expenses directly or indirectly incident to supervising the particular business of occupation. (*Post*, p. 325.)

Case cited and approved: *Ex parte Cramer*, 62 Tex. Cr. R., 11.

6. LICENSES. Occupation tax. Employment agencies.

A license issued to an employment agent on payment of an occupation tax under Pub. Act 1915, chapter 101, levied primarily for revenue, did not preclude the State and a city from denying him the privilege of continuing the emigrant feature of his business thereunder until its expiration without payment of the tax on emigrant agents imposed by Pub. Acts 1917, chapter 70, and a city ordinance. (*Post*, pp. 325, 326.)

Acts cited and construed: Acts 1915, ch. 101; Acts 1917, ch. 70.

7. WORDS AND PHRASES. "Employment agency."

An "employment agency" may be defined to be one for the brokerage of labor for a fee paid by the applicant for employment or by the prospective employer, and any definition thereof would include the employment of laborers to work for another either in or beyond the State, and it does not imply placing of laborers and domestics in the borders of the State only. *Post*, pp. 326-329.)

Cases cited and approved: *Kelly v. Dwyer*, 75 Tenn., 180; *Hirn v. State*, 1 Ohio St., 21.

Case cited and distinguished: *Robbins v. Taxing District*, 81 Tenn., 303.

8. CONSTITUTIONAL LAW. Licenses. Statutes. Modification or repeal.

A licensee is bound to know that his license or permit, issued on payment of a tax primarily for revenue, is held subject to modification or repeal of the law under which it was issued, from the making of which change if the public welfare required it, no incidental inconvenience to him would stay the law. (*Post*, pp. 329, 330.)

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Cases cited and approved: *Moore v. Indianapolis*, 120 Ind., 484; *Fell v. State*, 42 Md., 71; *Beer Co. v. Massachusetts*, 97 U. S., 25; *Plow Co. v. Hays*, 125 Tenn., 148.

Case cited and distinguished: *Gundling v. Chicago*, 177 U. S., 183.

9. **COMMERCE.** Interstate commerce. Restriction by license tax.

The tax imposed by Pub. Acts 1917, chapter 70, on the business of emigrant agents, is not a restriction on interstate commerce. *Post*, pp. 330, 331.)

10. **CONSTITUTIONAL LAW.** Licenses. Freedom of contract.

Such tax does not interfere with freedom of contract. (*Post*, pp. 330, 331.)

11. **CONSTITUTIONAL LAW.** Licenses. Equal protection of the Laws.

Such tax does not deny equal protection of the laws, because the business of hiring laborers within the State is not subject to a like tax. (*Post*, pp. 330, 331.)

Cases cited and approved: *Williams v. Fear*, 110 Ga., 584; *Kendrick v. State*, 142 Ala., 43; *State v. Hunt*, 129 N. C. 686; *People v. Warden*, etc., 183 N. Y., 223.

FROM KNOX.

Appeal from the Circuit Court of Knox County.—
VON A. HUFFAKER, Judge.

CHAS. M. ROBERTS, for plaintiff.

J. PIKE POWERS, JR., for defendant.

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MR. JUSTICE WILLIAMS delivered the opinion of the Court.

This suit involves the liability of plaintiff in error for conducting the business of an emigrant agent without obtaining a license, as required by a city ordinance. The case was tried upon an agreed statement of facts. McMillan was found guilty by the city recorder and, on appeal, by the circuit judge. He has prosecuted an appeal to this court and assigned error.

The General Assembly of 1917 (Pub. Acts 1917, chapter 70) made the conducting of the business of an "emigrant agent" a privilege, and fixed the tax at \$500 per annum; and the city, in pursuance of statutory power, subsequently by ordinance made the same a city privilege. The ordinance recites, substantially in the language of the statute:

"Emigrant Agent.

"Each emigrant agent, or person engaged in hiring or soliciting emigrants in this city to be employed or to go beyond the limits of the State must pay an annual license, each per annum, \$500."

Before the passage of the act and ordinance McMillan had paid the privilege tax prescribed for "employment agencies" in Acts 1915, chapter 101, and the license issued to him did not expire until October 8, 1917.

There was also passed in 1917 another act (Pub. Acts 1917, chapter 78) providing for the regulation

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and supervision of "employment agencies," which made it the duty of one engaging in that business to pay a fee and obtain a license from the State to be issued by the department of factory inspection. The act sets forth the details of the regulation by and the reporting to be made to the department, and prescribed a penalty for failure to comply. It is claimed by appellant that the passage of this last act operated to repeal by implication the other act or acts.

A further question is whether McMillan is liable for the emigrant agent's tax of \$500; and whether the license that he held as operator of an employment agency protects him in doing the acts complained of, which were done after the passage of the ordinance, but before that license had expired.

The errors assigned are fairly indicated in the discussion which follows, and will not be formally stated.

At the outset it becomes material to determine the nature of the license as employment agent so held by McMillan, and of the one issuable under the regulating statute. Chapter 78 of Acts 1917.

By article 2, section 28, of our Constitution, it is provided that the legislature shall have power to tax privileges in such manner as they may from time to time direct, thus stamping a privilege to pursue an occupation as a tax—more strictly speaking an "occupation tax," but usually called in this jurisdiction a "privilege tax."

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A "license," in its truer sense, is issued under the police power, while a license may be issued on the payment of an "occupation tax," levied under this taxing power embodied in the Constitution, revenue being its primary object, though regulation may be in mind as an incident. The two charges and licenses are distinct things, but confusion of thought arises at times, due to the fact that a license may be issued in either case. In the one case, the power exercised is that to license, and in the other to tax and to license. 3 McQuillin, Mun. Corp. section 961.

Judge COOLEY says that under the authority to license in the truer sense "a municipal corporation may by ordinance require a license to be first taken out, and charge a reasonable sum for issuing the same, and keeping the necessary record, but it cannot, by virtue of this authority, without more, levy a tax upon an occupation itself." *Mayor of Nashville v. Linck*, 12 Lea (80 Tenn.), 507. A license in this sense is a permit issued not for revenue, but for regulation. As said, an occupation tax is levied for revenue primarily, and, in instances, for regulation incidentally.

We are of opinion that it was competent for the legislature to provide a regulatory license for, and also an occupation tax upon, such agencies. The two are not inconsistent; neither impinges on the other. 17 R. C. L., p. 486. Therefore the enactment of chapter 78 did not repeal chapter 70 of the Acts of 1917.

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It was competent for the legislature to add to whatever regulation was manifested in the imposition of the privilege or occupation tax, by providing for the more detailed policing regulation set forth in Acts 1917, chapter 78, and to fix a fee therefor.

A true license fee, as contradistinguished from such a tax, should be fixed to cover the expense of issuing it, the service of officers, and other expenses directly or indirectly incident to the supervision of the particular business or vocation. There is no attempt in this case to question the amount of the license fee as being excessive or so unreasonable as to partake of the nature of a tax. *Ex parte Cramer*, 62 Tex. Cr. R., 11, 136 S. W., 61, 36 L. R. A. (N. S.), 78, Ann. Cas., 1913C, 588.

McMillan also insists that since he had a privilege license to operate an "employment agency" until October 8, 1917 (which license was issued to him under Pub. Acts 1915, chapter 101), he could not be required by the city, in order to continue emigrant business, to take out a license under chapter 70 of the Act of 1917, which, as stated, together with the ordinance thereunder, was passed while his license was current. The city's counter contention is that, after the passage of the act of 1917 and its own ordinance, McMillan exercised a separate privilege from the one formerly exercised under his license as employment agent.

Did the license held by McMillan when it was originally issued cover the emigrant feature of his business?

We think that an "employment agency" may be defined to be one for the brokerage of labor for a fee paid by the applicant for employment or by the prospective employer, and that any definition of the phrase "employment agency," in the absence of restrictive words, would include the employment of laborers to work for another either in or beyond the State. It is, moreover, made clear that the act of 1915 should be so construed, since the legislature itself proceeded upon that construction of the phrase "employment agency" in Pub. Acts 1917, chapter 78, wherein it is stipulated that it shall be unlawful for any person conducting an "employment agency" to ship any number of employees to any point without the State without first advising the applicants as to the existence of strikes, etc. The phrase "employment agency" does not imply the placing of laborers and domestic servants in the borders of this State only. Had McMillan engaged in the hiring of laborers for out of State employment only, prior to 1917, without procuring a license under the act of 1915, we doubtless would have held him subject to punishment; and this seems to us to be the test whether the license he did procure covered such an act.

Having then a license which on date of issue authorized him to engage in emigrant employment

business and which had not expired when he was arrested in this proceeding, the question arises whether it lay in the power of the city under legislative authority to carve out of the broader privilege of conducting an employment agency, one of its elements, employment of emigrant labor, and impose an occupation tax on the conduct of it.

It is observed that the attempt to create by subdivision a distinct privilege of conducting emigration agencies was the State's under its power; and that the city did not undertake without precedent and specific legislative power to make two privileges out of the business formerly conducted as an employment agency. As was said in *Robbins v. Taxing District*, 13 Lea (81 Tenn.), 303, 307:

"The legislature may divide merchants, or other dealers into classes for the purpose of separate taxation, and may authorize municipal corporations to make the same division. The legislature, by the statute under consideration, has now done what the municipality could not itself previously do and created a privilege of a specified part of a general business, which might otherwise have been carried on under the usual occupation license, for purposes of taxation. This was, as we have repeatedly held, within the competency of the legislature."

Was it also competent for the legislature to so change the privilege as to deny to McMillan the right to continue the emigrant feature of his business under his license until the date of its expiration?

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This depends upon the nature of the right conferred by that license. In *Kelly v. Dwyer*, 7 Lea (75 Tenn.), 180, it appeared that a general grocery merchant, who kept spirituous liquors as a part of his stock, took out license issuable to a merchant of his class, protecting him in the sale of the liquors; but during the running of the license period the legislature passed an act declaring the business of a liquor dealer to be a privilege, not to be exercised without a license and the payment of a special privilege tax. It was held that the old license did not longer protect the dealer in respect of the liquor feature of his business, the court saying:

“It is insisted by the plaintiffs that they are protected by their license from the payment of any of these taxes until the expiration of their license on the 1st of November, 1881. But the license, as we have seen, is only to exercise the privilege of merchants for one year, ‘subject to the laws of the State,’ and the bond executed by the merchant is to pay the amount of State and county tax ‘as prescribed by law.’ Neither the license nor the bond limits the taxes which the merchant shall pay, to the taxes as they stood at the date of the bond. No part of the taxes for the year 1881 was then paid. The license was only a license, not a contract by the payment of a consideration. There was no estoppel on either party. The plaintiffs might have ceased to do business before the 1st of January, 1881, and the state had plenary power to change its rate of taxation at any time.”

This is in harmony with the general rule. In *Cooley on Taxation* (3 Ed.), 1150, it is said that a license to sell liquors is not a grant or contract, but a mere permit subject to be changed or even annulled whenever the public welfare demands it; and that its issuance does not preclude the licensee's being required to pay a different or a larger fee or tax for the unexpired term.

In *Hirn v. State*, 1 Ohio St., 21, the plaintiff had been granted a license under the laws of that State to keep an inn, which permitted him to sell spirituous liquors for a certain period of time, and had paid therefore a substantial license fee. Before the expiration of that period the legislature passed an act repealing the law under which the license was granted, and thereby revoked the license. The plaintiff contended that the legislature had no power to pass such an act. But the court said they were not disposed to question the power of the legislature in a matter of that kind, connected, as it was, with the public policy and domestic regulations of the State; that upon the ground of protecting the health, morals, and good order of the community, they were not prepared to say that the legislature did not possess the power to revoke such license.

The privilege tax involved in this case was levied not merely for revenue, but with regulation as an incidental purpose; and we hold that when such is the case, the State and city are not estopped or precluded as claimed. The licensee was bound to know

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that the license or permit was held subject to the modification or repeal of the law under which it was issued, from the making of which change, if the public welfare required it, no incidental inconvenience he would suffer could stay the hand of the State. *Moore v. Indianapolis*, 120 Ind., 484, 22 N. E., 424; *Fell v. State*, 42 Md., 71, 20 Am. Rep., 83; *Beer Co. v. Massachusetts*, 97 U. S., 25, 24 L. Ed., 989; *Plow Co. v. Hays*, 125 Tenn., 148, 154, 140 S. W., 1068, and cases there cited.

“It is not a valid objection to the ordinance that it partakes of both the character of a regulation and also that of an excise or privilege tax. The business is more easily subjected to the operation of the power to regulate, where a license is imposed for following the same, while the revenue obtained on account of the license is none the less legal because the ordinance which authorized it fulfills the two functions, one a regulating and the other a revenue function. So long as the State law authorizes both regulation and taxation, it is enough, and the enforcement of the ordinance violates no provision of the federal Constitution.” *Gundling v. Chicago*, 177 U. S., 183, 20 Sup. Ct., 633, 44 L. Ed., 725.

A further attempt is made to impeach the constitutionality of the privilege or occupation tax, assessed by the city on emigration agencies under the authority of chapter 70 of Pub. Acts of 1917, for unconstitutionality.

In several States taxes have been imposed upon persons engaged in the business of hiring laborers in the State to emigrate and take employment out of the State. The tax is held to be neither a restriction upon interstate commerce nor an interference with the freedom of contract; nor does it deny the equal protection of the laws, because the business of hiring persons to labor within the State is not subjected to a like tax. Perhaps the leading case is *Williams v. Fear*, 110 Ga., 584, 35 S. E., 699, 50 L. R. A., 685, affirmed 179 U. S., 276, 21 Sup. Ct., 128, 45 L. Ed., 186; and in accord are *Kendrick v. State*, 142 Ala., 43, 39 South., 203; *State v. Hunt*, 129 N. C., 686, 40 S. E., 216, 85 Am. St. Rep., 758; *People v. Warden, etc.*, 183 N. Y., 223, 76 N. E., 11, 2 L. R. A. (N. S.), 859, 5 Ann. Cas., 325, and note.

We, therefore, hold that said act is not unconstitutional in these respects.

We are thus brought to the conclusion that appellant was liable for the \$500 tax, and that the judgment of the court below must be affirmed. So ordered.

CHATTANOOGA RY. & LIGHT CO. v. K. H. BETTIS.

(Knoxville. September Term, 1917.)

1. STATUTES. Repeal. Constitutionality.

Priv. Acts 1911, chapter 269, providing for lawful fences in Hamilton county, is not unconstitutional as being in violation of Constitution, article 2, section 17, requiring an act repealing a former act to recite the title or substance of the former act, such act, though not referring sufficiently to the title, in fact making adequate reference to the substance. (*Post*, pp. 334, 335.)

Acts cited and construed: Acts 1899, ch. 23; Acts 1911, ch. 269.

Cases cited and approved: *State v. Runnels*, 92 Tenn., 320; *Ransom v. State*, 91 Tenn., 716; *State ex rel. v. Gaines*, 69 Tenn., 734.

Constitution cited and construed: Art. 2, sec. 17.

2. ANIMALS. Stock laws. Statutes.

Priv. Acts 1911, chapter 269, providing for lawful fences in Hamilton county, does not repeal by implication Acts 1899, chapter 23, making it unlawful to permit stock to run at large in Hamilton county; the act of 1911 only applying to rural districts in such county, and therefore not covering the same field. (*Post*, p. 335.)

3. STREET RAILROADS. Injuries to animals. Contributory negligence.

Defendant railroad company was sued for negligently killing plaintiff's pig, and interposed a defense of contributory negligence, based upon plaintiff's violation of Acts 1899, chapter 23, making it unlawful to permit stock to run at large. *Held*, that such act, not being passed for the protection of defendant railroad company, it could not predicate a defense of contributory negligence thereon. (*Post*, pp. 335-337.)

Cases cited and approved: *Central Branch R. Co. v. Lea*, 20 Kan., 353; *Kansas City, etc., R. Co. v. McHenry*, 24 Kan., 501; *Rail-*

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road Co. v. Cocke, 64 Tex., 151; Locke v. Railway, 15 Minn., 350; Queen v. Dayton Coal & Iron Co., 95 Tenn., 458; Weeks v. McNulty, 101 Tenn., 495; Iron & Wire Co. v. Green, 108 Tenn., 161; Railway v. Haynes, 112 Tenn., 712; Willey v. Mulledy, 78 N. Y., 310.

Cases cited and distinguished: Adams v. Inn Co., 117 Tenn., 470; Pauley v. Steam Guage, etc., Co., 131 N. Y., 90.

4. ACTION. Operation. Violation.

One not the beneficiary of a statute may neither base an action nor defense on a violation thereof. (*Post*, pp. 337-340.)

Acts cited and construed: Acts 1899, ch. 23.

Cases cited and approved: Pennsylvania Co. v. Frana, 112 Ill., 398; Sherman v. Fall River, etc., Co., 5 Allen (Mass.), 213; Alabama G. S. R. Co. v. McAlpine, etc., Co., 71 Ala., 545; Roberts v. R. & D. R. Co., 88 N. C., 560; Owens v. Hannibal, etc., R. Co., 58 Mo., 337; Schwarz v. Hannibal, etc., R. Co., 58 Mo., 207; Roberts v. M. & O. R. Co., 74 Miss., 384; Orcutt v. Pacific Coast R. Co., 85 Cal., 291; Gulf, etc., R. Co. v. Washington,, 49 Fed., 347.

Cases cited and distinguished: Hughes v. Atlanta Steel Co., 136 Ga., 511.

FROM HAMILTON.

Appeal from the Circuit Court of Hamilton County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.
—NATHAN L. BACHMAN, Judge.

BROWN, SPURLOCK & BROWN, for appellant.

HENRY A. BLACKWELL, for defendant.

MR. JUSTICE GREEN delivered the opinion of the Court.

In this case there was a judgment below for the value of a pig killed by a street car belonging to the plaintiff in error. This judgment was affirmed by the court of civil appeals, and the case has been brought before us by petition for *certiorari*.

It is not denied in this court that there was some evidence of negligence on the part of the motorman in charge of the street car. Plaintiff in error, however, insists that the owner of the pig cannot recover, inasmuch as it was at large at the time it was killed, in violation of a stock law said to have been in force in Hamilton county.

The plaintiff in error relies on chapter 23 of the Acts of 1899, which made it unlawful to permit stock to run at large in Hamilton county and other large counties of the State.

The lower courts were of opinion that the said act was repealed by implication by chapter 269 of the Acts of 1911, which undertook to provide for lawful fences in Hamilton county. Plaintiff in error insists that the Act of 1911 is unconstitutional, inasmuch as it purports on its face to be an act which repeals a former act of the legislature without reciting the title or substance of said former act, as section 17 of article 2 of the Constitution requires. We do not think the act of 1911 is unconstitutional. While it does not sufficiently refer to the title of the act it

undertakes to repeal, it does make adequate reference to the substance of the former act, and this is sufficient. *State v. Runnels*, 92 Tenn., 320, 21 S. W., 665; ; *Ransome v. State*, 91 Tenn., 716, 20 S. W., 310; *State ex rel. v. Gaines*, 69 Tenn. (1 Lea), 734.

We do not agree with the lower courts that the act of 1911 worked a repeal by implication of the act of 1899. The act of 1899 applies to all of Hamilton county and to the other larger counties of the State. The act of 1911 only applies to the rural districts of Hamilton county, the incorporated towns in that county being excepted from its provisions; so that the two statutes do not cover the same field.

Just how far the earlier act is modified by the later one we do not feel called upon to determine in this case. For the purposes of this opinion we may concede that the act of 1899 is in force in Hamilton county, and that the pig killed was at-large in violation of said statute. Nevertheless, we think that the owner is still entitled to recover for its value, it not being controverted that the evidence showed some negligence on the part of the motorman in charge of the car which killed it.

We are aware that it has been held in several jurisdictions that an owner of animals allowing them to be at large in violation of stock laws is guilty of such contributory negligence as to bar his recovery for the negligent injuring of the animals by another. To this effect seem to be *Central Branch R. Co. v. Lea*, 20 Kan., 353; *Kansas City, etc., R. Co. v. Mc-*

Henry, 24 Kan., 501; *Railroad Co. v. Cocke*, 64 Tex., 151; *Locke v. Railway*, 15 Minn., 350 (Gil., 283), and perhaps other cases.

We are not able, however, to follow these authorities.

This court has declared that: "Generally speaking, the violation of a rule of the common law, a statute, or an ordinance of a municipality, or failure to discharge and perform a duty so imposed in the interest of the public, is actionable negligence, and any one coming within the protection of the law, or intended to be benefited by it, who suffers an injury peculiar to himself, the proximate cause of which is the violation or nonperformance of the law, may maintain an action against the offender for the injuries sustained by him." *Adams v. Inn Co.*, 117 Tenn., 470, 101 S. W., 428.

This principle has also been declared in *Queen v. Dayton Coal & Iron Co.*, 95 Tenn., 458, 32 S. W., 460, 30 L. R. A., 82, 49 Am. St., Rep., 935; *Weeks v. McNulty*, 101 Tenn., 495, 48 S. W., 809, 43 L. R. A., 185, 70 Am. St. Rep., 693; *Iron & Wire Co. v. Green*, 108 Tenn., 161, 65 S. W., 399; *Railway v. Haynes*, 112 Tenn., 712, 81 S. W., 374.

It has been argued that the violation of a statute constituted merely a breach of duty to the State, and that the only remedy was the public remedy or a prosecution by the authorities of the State.

In *Pauley v. Steam Gauge, etc., Co.*, 131 N. Y., 90, 29 N. E., 999, 15 L. R. A., 194, upon which our

pioneer case of *Queen v. Dayton Coal & Iron Co.*, supra, was based, the New York court of appeals rejected the argument just referred to, and said:

"The rule applies that when a statute commands or prohibits a thing for the benefit of a person he shall have a remedy upon the same statute for the thing enacted for his advantage or for a wrong done to him contrary to its terms." *Pauley v. Steam Gauge, etc., Co.*, supra, following *Willey v. Mulledy*, 78 N. Y., 310, 34 Am. Rep., 536.

In order to found an action on the violation of a statute, or ordinance, these cases make it plain that the person suing must be such a person as is within the protection of the law and intended to be benefited thereby.

"And it may be stated as a general proposition, though there may be difficulty in some cases in applying it, that the violation of a statute or municipal ordinance is not of itself a cause of action grounded upon negligence in favor of an individual, unless the statute or ordinance was designed to prevent such injuries as were suffered by the individual claiming the damages, and often not then, the question depending upon judicial theories and surmises." Thompson on Negligence (2 Ed.), section 12.

By a parity of reasoning, in order to justify a defendant in pleading the breach by plaintiff of a statute as a bar to a suit founded on defendant's negligence, it should appear that the statute was intended to prevent such accidents as that for which

redress is sought. In other words, it should appear that the defendant, in the prosecution of the activity which resulted in the injury, was under the protection of the statute, or that the scene of defendant's activity was so protected. We think that one not a beneficiary of a statute may neither base an action nor a defense on a violation thereof. Unless an individual be within the province of a statute, its violation is no breach of duty to him.

This conclusion is well supported by authority.

The supreme court of Illinois has held that a railroad company could not make a defense of contributory negligence on the fact that the plaintiff when injured was engaged in hauling lumber to stack it in violation of an ordinance passed to guard against the destruction of property by fire. *Pennsylvania Co. v. Frana*, 112 Ill., 398.

In Massachusetts, it has been held that keeping a livery stable without license in violation of law was not a bar to the liveryman's action for a nuisance to his real estate. *Sherman v. Fall River, etc., Co.*, 5 Allen (Mass.), 213.

The supreme court of Alabama, in considering a stock law case, where the railroad company relied on a violation of the law as contributory negligence, barring a recovery by the owner, for the negligent injury of his animals, observed that the statute was "confined to the protection of growing crops, and had no reference to the liability of railroad companies." For this and other reasons, the court rejected the

contention of the company. *Alabama G. S. R. Co. v. McAlpine etc., Co.*, 71 Ala., 545.

The same question has been presented in many cases where the injured plaintiff was working on Sunday in violation of law, and this fact has been set up as a defense.

In such a case the supreme court of Georgia has said: "The statute denouncing as penal the following of one's ordinary calling on the Lord's day defines and declares a duty to the State. A breach of duty to the State does not necessarily involve a breach of duty to the defendant in such cases; and, when it does not, it is simply an irrelevant fact, unless the law gives it relevancy in some express form." *Hughes v. Atlanta Steel Co.*, 136 Ga., 511, 71 S. E., 728, 36 L. R. A. (N. S.), 547, Ann. Cas., 1912C, 394.

The case just mentioned is annotated in Ann. Cas., 1912C, 397, and in 36 L. R. A. (N. S.), 547, where many cases in accord are collected, and some to the contrary.

The substance of the cases is thus stated in the Cyclopaedia of Law and Procedure: "As in the case of the violation of a statute or ordinance by a defendant, it is necessary that the statute or ordinance be intended to prevent such an injury as is ground for suit, and where it has no relation to the act causing the injury, violation of it will not be contributory negligence. In addition, the violation of a statute or ordinance must be the proximate cause of the injury." 29 Cyc., 525.

Obviously chapter 23 of the Acts of 1899 was not passed for the benefit of the street railway companies operating in Hamilton county. This law was not designed for their protection, and had no relation to the act causing this injury. The caption of the statute indicates that it was passed to "prevent the necessity of fencing lands" in the counties to be affected thereby. It was therefore enacted primarily for the benefit of landowners and those cultivating crops likely to be injured by straying cattle. The relief of street car companies was not within the purview of this legislation.

Many courts have held that the existence of stock laws afforded no excuse for the negligent injury of animals by railroad companies. *Roberts v. R. & D. R. Co.*, 88 N. C., 560; *Owens v. Hannibal, etc., R. Co.*, 58 Mo., 387; *Schwarz v. Hannibal, etc., R. Co.*, 58 Mo., 207; *Roberds v. M. & O. R. Co.*, 74 Miss., 334, 21 South., 10; *Orcutt v. Pacific Coast R. Co.*, 85 Cal., 291, 24 Pac., 661; *Gulf, etc., R. Co. v. Washington*, 16 Fed., 347, 1 C. C. A., 286, and other cases might be cited.

In reaching a like result, we prefer to place our decision on the ground that the act of 1899 was not passed for the protection of the plaintiff in error, and that the plaintiff in error cannot predicate a defense of contributory negligence barring recovery upon a violation of said statute.

For the reasons stated, the judgment of the court of civil appeals is affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
MIDDLE DIVISION

NASHVILLE, DECEMBER TERM, 1917.

STATE *v.* W. P. ERWIN.

(*Nashville.* December Term, 1917.)

**CONSTITUTIONAL LAW. Licenses. Statutes. Due process of law.
Compensation. Uniform Taxation. General Laws.**

Acts 1907, chapter 32 (Thomp. Shan. Code, section 2853a2 et seq.), requiring registration and license fee of \$3 in order to keep a female dog, the fees over expenses to go to the school fund, does not contravene Const. article 1, sections 8, 21, article 2, section 28, nor article 11, section 8, providing that property shall not be taken without a judgment of peers of the land, or without compensation, that taxes shall be uniform, and prohibiting special laws.

Acts cited and construed: Acts 1907, ch. 32; Acts 1875, ch. 67.

Cases cited and approved; *State v. Brown*, 68 Tenn., 53; *Wheatley v. Harris*, 36 Tenn., 468; *Citizens' Rapid Transit Co. v. Dew*, 100 Tenn., 323; *Fink v. Evans*, 95 Tenn., 413; *Phillips v. Lewis*, 3 Tenn. Cas., 230; *Sentell v. New Orleans & Carrollton R. R. Co.*, 166 U. S., 698; *Paxton v. Fitzsimmons*, 253 Ill., 139 Tenn.] (341)

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355; McGlone v. Womack, 129 Ky., 274; Carthage v. Rhodes, 101 Mo., 175; Litchville v. Hanson, 19 N. D., 672; Dickerman v. Railroad, 79 Conn., 427; Foster v. Speed, 120 Tenn., 470; Motlow v. State, 125 Tenn., 559; State v. Persica, 130 Tenn., 48; State v. Nowell, 137 Tenn., 82; Lindsley v. Gas Co., 220 U. S., 61.

Code cited and construed: Sec. 2853a2 (T.S.).

Constitution cited and construed: Secs. 8, 21, Art. 1; Sec. 28, Art. 2; Sec. 8, Art. 11.

FROM MAURY.

Appeal from the Criminal Court of Maury County.
—J. T. McKNIGHT, Judge.

W. H. SWIGGART, JR., Assistant Attorney-General,
for the State.

WEBSTER & WEBSTER, for appellee.

MR. JUSTICE FENTRESS delivered the opinion of the Court.

The defendant was indicted for keeping a female dog more than three months of age, without having reported the dog for registration, as required by chapter 32 of the Acts 1907 (Thomp. Shan. Code, section 2853a2 et seq.) He moved to quash the indictment upon the ground that the act was unconstitutional, and the trial judge sustained the motion. The State has appealed to this court.

The caption of the act is entitled:

“An act to regulate the keeping of female dogs, by requiring them to be registered and to declare the running at large of unregistered female dogs a public nuisance.”

It provides that the circuit court clerk shall keep a book in which all female dogs in the county three months old and over, shall be registered in the following form:

“Number, name, age, color, breed, name and address of keeper, date of registry.”

It is also provided that the owner shall pay \$3 for each dog registered and that the clerk shall furnish a collar and a tag to be worn by the dog, upon which shall be stamped the registration number.

It is made a misdemeanor for any person owning or keeping such a dog to fail to report it for registration, or to permit it to run at large without registration.

The act makes it the duty of the circuit court clerks on the 31st of December of each year to “make up their accounts of the receipts from the registry of female dogs, from which shall be deducted the cost of books, collars, tags or other necessary expense, and a fee of fifty cents for each female dog registered, which shall be the fee or compensation of the clerk, and he shall make a report to commissioner of agriculture on the 10th of January of each year of the number of female dogs registered in his county the preceding year.”

It is further provided that the balance shall go to the common school fund.

The defendant insists that the act contravenes sections 8 and 21 of article 1, and section 28 of article 2, and section 8 of article 11, of the Constitution of the State, and is therefore void.

It has been repeatedly held by this court that dogs are property. *State v. Brown*, 9 Baxt., 53, 40 Am. Rep., 81; *Wheatley v. Harris*, 4 Sneed, 468, 70 Am. Dec., 258; *Citizens' Rapid Transit Co. v. Dew*, 100 Tenn., 323, 45 S. W., 790, 40 L. R. A., 518, 66 Am. St. Rep., 754; *Fink v. Evans*, 95 Tenn., 413, 32 S. W., 307; *Phillips v. Lewis*, 3 Tenn. Cas., 230. However, they are property of such a character that the Legislature, in the exercise of the police power of the State, has seen fit to regulate the keeping of them, so as to protect the safety of the people and of property from their offensive and destructive propensities. The right to do so is not denied, but it is said the act is not a police measure, but a revenue act, and therefore can not be upheld. The insistence is that compliance with the statute will not make dogs less obnoxious. Of course, the registration of dogs and attaching to them collars with tags, for which the owner is made to pay a tax, will not change their inherently bad qualities; but it will probably reduce their number and cause the owners of them to use greater care to see that they do not harm the persons or property of others. Legislative acts and city ordinances of similar purport, imposing a privilege or special tax upon the keeping of dogs have almost universally been held to be a constitutional exercise of the police power of the States and municipalities. *Sentell v.*

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New Orleans & Carrollton R.R. Co., 166 U. S., 698, 17 Sup. Ct., 693, L. Ed., 1169; *Paxton v. Fitzsimmons*, 253 Ill., 355, 97 N. E., 675, 39 L. R. A. (N. S.), 855; *McGlone v. Womack*, 129 Ky., 274, 111 S. W., 688, 17 L. R. A. (N. S.), 855; note to *Citizens' Rapid Transit Co. v. Dew*, 40 L. R. A., 520; *Carthage v. Rhodes*, 101 Mo., 175, 14 S. W. 181, 9 L. R. A., 352; *Litchville v. Hanson*, 19 N. D., 672, 124 N. W., 1119, Ann. Cas., 1912D, 876; *Dickerman v. Railroad*, 79 Conn., 427, 65 Atl., 289, 8 Ann. Cas., 417.

In *Foster v. Speed*, 120 Tenn., 470, 111 S. W., 925, 22 L. R. A. (N. S.), 949, 15 Ann. Cas., 1066, this court held that, if one maintains a nuisance by doing something which causes the public a special inconvenience and increases the cost of government, that fact justifies the State in discriminating against him in taxation, because the burden of taxation should fall heaviest upon those things which are obnoxious to the public.

Such enactments are not arbitrary class legislation. *Motlow v. State*, 125 Tenn., 559, 145 S. W., 177, L. R. A. 1916F, 177; *State v. Persica*, 130 Tenn., 48, 168 S. W., 1056; *State v. Norvell*, 137 Tenn., 82, 191 S. W., 536, L. R. A., 1917D, 586; *Lindsley v. Gas Co.*, 220 U. S. 61, 31 Sup. Ct., 337, 55 L. Ed. 369, Ann. Cas., 1912C, 160.

It is insisted that in *Phillips v. Lewis*, 3 Shan. (Tenn. Cas.), 230, this court held to be unconstitutional chapter 67 of the Acts of 1875, which imposed a tax upon keeping dogs, upon the ground that it subjected this character of property to double taxation. That act should be distinguished from the act

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here attacked. The primary object of the former was to raise revenue. This is shown by the italicized portion of the caption: "*An act to increase the revenue of the State* and encourage wool-growing." The court held that it was not intended to be a police regulation. The object of the present act is the regulation of dogs. The tax is only an incident to the object expressed, and is not much more than enough to cover the cost of its execution.

We are of the opinion that the act is a valid exercise of the police power of the State. The judgment of the trial court is reversed, and the case will be remanded for further proceedings.

KENNER WARD *v.* PERCY SHARPE.*(Nashville. December Term, 1917.)***1. INFANTS. Contracts. Validity. Want of consideration.**

As a minor is prejudiced by sale without advertisement of furniture bought on the installment plan, under Acts 1911, chapter 8, section 1, his agreement, waiving advertisement, is void; there being no consideration for such a waiver except the cost of advertisement. (*Post*, pp. 348-350.)

Acts cited and construed: Acts 1911, ch. 8, sec. 1; Acts 1889, ch. 81.

Cases cited and approved: *Wheaton v. East*, 13 Tenn., 41; *Swafford v. Ferguson*, 71 Tenn., 292; *Chambers v. Railroad*, 130, Tenn., 459; *Scobey v. Waters*, 78 Tenn., 551; *Langford v. Frey*, 27 Tenn., 443; *Robinson v. Coulter*, 90 Tenn., 705.

2. SALES. Conditional sales. Default. Advertisement. Waiver.

While a seller and purchaser in a conditional sale can waive advertisement and sale on default, as provided in Acts 1889, chapter 81, yet advertisement cannot be waived unless the sale is also waived, because the purpose of allowing the waiver is to permit a final settlement of the account by agreement. (*Post*, pp. 350-353.)

Cases cited and approved: *Whitelaw Furniture Co. v. Boon*, 102 Tenn., 720; *Lieberman v. Puckett*, 94 Tenn., 274; *Massillon Engine & Thresher Co. v. Wilkes*, 82 S. W., 316; *Ice & Coal Co. v. Alley*, 127 Tenn., 178; *Case v. Watson*, 122 Tenn., 148.

FROM DAVIDSON

Appeal from the Circuit Court of Davidson County.—A. G. RUTHERFORD, Judge.

Ward v. Sharpe.

WM. HOWARD EWING, JR., and THOS. G. WATKINS,
for appellant.

R. B. C. HOWELL, for appellee.

MR. CHIEF JUSTICE NEIL delivered the opinion of the court.

Plaintiff, who was a minor, about twenty years of age and married, purchased of the defendant certain furniture with which to begin housekeeping, the title being retained by the vendor to secure the purchase money. The price agreed to be paid was about \$106.20 on the installment plan, at so much per week. After paying \$45 plaintiff defaulted in one or more of the weekly payments. Thereupon the defendant reclaimed the furniture with the plaintiff's consent, and sold it without making advertisement of the sale, as required by law in such cases. However, the plaintiff signed a written waiver of advertisement. This suit was brought for the recovery of the \$45 which had been paid on the furniture.

The trial judge held that the waiver was valid, and the plaintiff could recover nothing, and dismissed the suit. The court of civil appeals affirmed this judgment.

We think both courts were in error. The plaintiff was a minor at the time he made the waiver, which, being an act necessarily to his prejudice, was wholly void. The rule has been laid down in this State that when the court can pronounce a contract

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of an infant to be to his prejudice it is void; and when to his benefit, as for necessities, it is good; and when the contract is of an uncertain nature as to benefit or prejudice, it is voidable only at the election of the infant. *Wheaton v. East*, 5 Yerg. (13 Tenn.), 41, 26 Am. Dec., 251; *Swafford v. Ferguson*, 3 Lea (71 Tenn.), 292, 294, 31 Am. Rep., 639; *Chambers v. Railroad*, 130 Tenn., 459, 461, 171 S. W., 84. It was to the prejudice of the plaintiff because it was without consideration. *Scobey v. Waters*, 10 Lea (78 Tenn.), 551, 557, and see *Langford v. Frey*, 8 Humph. (27 Tenn.), 443, 446. It is urged that the expense of advertising the sale was saved. This expense, if any, could have been only nominal, because it is provided by Acts 1911, chapter 8, section 1, that the sale may be made either by written or printed posters, posted at as many as three public places in the county where the property is to be sold, one of said places to be in the district in which the property is to be sold and one at the courthouse door and the other at any public place in the county. Manifestly, the expense, if any, would have been trifling. The rule is that where there is no consideration, or it is merely nominal, the contract is void. *Robinson v. Coulter*, 6 Pick. (90 Tenn.), 705, 18 S. W., 250, 25 Am. St. Rep., 708. It was assumed in the lower courts that because the plaintiff could buy the property, on the ground that the furniture was a necessity to his housekeeping, the same necessity would justify his surrendering the right which the law gave

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him to have the property advertised for sale. The conclusion by no means follows. It is to the infant's benefit to buy necessities; it is to his prejudice to surrender a right without adequate compensation. That the right was a valuable one is apparent when we consider that the law provides that when the seller, under a conditional sale of personalty, takes back the property he is under the duty of advertising within ten days and selling at public auction, and of paying to the original vendee any excess that such sale may realize over the debt. Clearly there is more probability of realizing such excess when a sale is properly advertised than there is when it is made without any advertisement at all. The act that governs the case (Chapter 81, Acts of 1889), permits the vendor to be a purchaser at the sale. It is more than probable that when he sells without advertising he will become the purchaser and thus sacrifice the rights of the original vendee.

There is another reason equally as satisfactory. The act of 1889 referred to was based on the policy of protecting persons who buy property under conditional sales, such persons being usually impecunious. It was the intention of the legislature to protect these people from oppression on the part of vendors. For this reason the provisions for advertisement and sale above mentioned were made, with the further provision that in case there should be a surplus it should be paid to the original purchaser.

In order to more carefully protect the rights of such poor persons it was provided that the original purchaser might recover the balance by motion before any justice of the peace, or any court having jurisdiction of the amount, after giving five days' written notice. Another provision for the same purpose was made that, in case the original seller or vendor, after having taken possession, should fail to advertise and sell, as required by the act, the original purchaser should have the right to recover from the seller that part of the consideration which he had previously paid for the property. In other words, in case the original seller or vendor fails to make advertisement and sale, the original vendee is entitled to treat the contract as rescinded, and sue for the purchase money he has previously paid. The court has always treated the requirements as to advertisement and sale with the greatest strictness. *Whitelaw Furniture Co. v. Boon*, 102 Tenn., 720, 52 S. W., 155; *Lieberman v. Puckett*, 94 Tenn., 274, 29 S. W., 6; *Massillon Engine & Thresher Co. v. Wilkes*, 82 S. W., 316; *Ice & Coal Co. v. Alley*, 127 Tenn., 178, 179, 154 S. W., 536; *Case v. Watson*, 122 Tenn., 148, 122 S. W., 86, 974. It is true that the act provides that the original seller and purchaser "may at any time by agreement waive the sale provided in this act." The act does not permit the waiving of the advertisement alone. It does not permit the waiving of the sale preliminary to default made. In other words, it does not permit such a provision to be contained in the con-

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tract of sale. *Massillon Engine & Thresher Co. v. Wilkes*, supra. The reason why the advertisement and sale may be together waived and not the advertisement alone is this: When the sale is waived by agreement between the parties this necessarily means that the vendor takes the property back on some terms agreeable to the vendee; that is, there either must be a rescission in this form or some kind of accord and satisfaction. In case the advertisement alone is waived, this means that the original vendor may put the property up at sale, and in case it fails to bring the balance due he can hold what is left unpaid as a debt against the original purchaser, the act providing that, should the property at the sale fail to realize a sufficient sum to satisfy the claim of the seller, the balance still remaining due on the claim "shall be and continue a valid and legal indebtedness as against said purchaser." Permitting the waiver of the advertisement and a sale without advertisement would destroy the beneficent purpose of the act to protect the poor persons who usually buy property under these conditional sales. We do not mean to say, of course, that all persons who buy property in this form are poor persons, but as a rule those who do so buy are poor and unable to give other form of security. It was the intention of the act to protect these people, and the court has steadily upheld and given effect to that intention at all times.

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The result is that the judgment of the court of civil appeals must be reversed, and judgment entered here for the \$45, with interest from the date of the attempted resale. The defendant will pay all of the costs of the cause.

CHATTANOOGA & TENNESSEE RIVER POWER CO. v.
LAWSON.

(*Nashville*. December Term, 1917.)

1. **EMINENT DOMAIN. Compensation. Dams. Appropriation of lands. Award to landlord.**

Erection of Tennessee river dam, backing water over lands adjacent to those occupied by plaintiff as tenant at will, was an appropriation for flowage purposes, all resulting damages from which were compensated by an award to the owner, plaintiff's landlord. (*Post*, p. 369.)

2. **UNITED STATES. Government dam. Consequential damages. Liability of contractor.**

A private contractor, building a dam to be deeded to the United States in a navigable stream under direction and according to specifications of the United States, is liable only to the same extent as the government, which is not liable for the consequential damages to a tenant at will of one who has been compensated for land taken, by alternate overflow and recession of water, causing stagnation and breeding mosquitoes which infected plaintiff and his family with malaria. (*Post*, pp. 369-371.)

Cases cited and approved: *Chattanooga & Tennessee River Power Co. v. United States*, 209 Fed., 28; *United States v. Lynah*, 188 U. S., 445; *Gibson v. U. S.*, 166 U. S., 269; *Northern Transportation Co. v. Chicago*, 99 U. S., 640; *Scranton v. Wheeler*, 179 U. S., 141; *Union Bridge Co. v. U. S.*, 204 U. S., 364.

3. **UNITED STATES. Dams. Consequential damages. Contractor's liability for torts.**

Such contractor, being liable only to the same extent as the government, it is not liable for the tort of failing to remove obstructions and rubbish after each overflow, since the United States is not liable for torts. (*Post*, pp. 371, 372.)

C. & T. R. Power Co. v. Lawson.

4. UNITED STATES. Dams. Liability of contractor.

Under agreement of such contractor to save the United States harmless on account of any damage, it was liable only to the same extent as the United States. (*Post*, pp. 371, 372.)

5. UNITED STATES. Dams. Appropriation of lands. Torts.

Where a dam was erected for the United States in navigable stream and alternate overflow and recession caused by stagnant pool on land of a private owner, the United States was not liable for failure to drain the pool, since it had no right to go upon private lands for such purpose. (*Post*, p. 372.)

Case cited and approved: *Railway Co. v. Telford*, 89 Tenn., 293.

6. NUISANCE. Dams. Contractor's liability.

That a dam erected for the United States in navigable waters created unhealthful conditions by making stagnant pools of water did not make it a nuisance, nor render the contractor liable as for maintaining a nuisance. (*Post*, pp. 373-376.)

Case cited and approved: *Colcough v. Nashville & N. & W. R. Co.*, 39 Tenn., 171.

7. UNITED STATES. Dams. Consequential damages. Liability of contractor.

That a private contractor building dam to be deeded to the United States in navigable stream under direction and according to specifications of the United States retained an interest in the surplus water for power production did not render it liable for merely consequential damages to residents of the vicinity by reason of creation of unhealthful and malarial conditions. (*Post*, pp. 376, 377.)

FROM MARION.

Appeal from the Circuit Court of Marion County
to the Court of Civil Appeals, and by *certiorari* to the

Court of Civil Appeals from the Supreme Court.—
FRANK L. LYNCH, Judge.

WILLIAMS & LANCASTER and SPEARS & SPEARS, for
appellants.

TATUM, THACH, LYNCH & HALL and S. B. SMITH, for
appellee.

MR. CHIEF JUSTICE NEIL delivered the opinion of the
Court.

The declaration avers that the defendant in error was, with his family, occupying as his home a certain small parcel of land lying near the bank of the Tennessee river; that the plaintiff in error, in the year 1905, or 1906, began the construction of a dam across the river at Hale's bar, about thirty-eight miles below the city of Chattanooga, and below the tract on which defendant in error was residing, as stated; that the dam was completed about December, 1913; that when this completion was effected the water above the dam immediately began to rise until it finally reached the height of thirty-eight feet above the ordinary low-water mark, with the result that for a distance of about thirty-five or forty miles up the river the water was caused to rise and overflow a large area of adjacent lands, creating a large lake.

It is further averred that while it was the duty of the plaintiff in error to so construct the lake as not to create a nuisance, and this could have

been done by first removing from the land to be inundated all growing crops, trees, bushes, and other vegetable matter, yet the plaintiff in error, unmindful of this duty and without using proper caution to prevent injury to defendant in error and others, wrongfully and negligently allowed a large area of land, on which were large quantities of growing crops, trees, bushes, brush, and other vegetable matter, to be and become overflowed with water, whereby the vegetation above mentioned was caused to decay and emit noxious and poisonous gases, and foul and noisome smells, rendering the atmosphere unwholesome, and thus destroying the healthfulness and comfort of defendant in error's home, and the comfort and health of himself and his family; that on account of the poisonous gases and vapors mentioned defendant in error became ill and suffered great physical pain and anguish; that his wife, Maud Lawson, and his children, Ed, Sam, Bessie, Raymond, and Ransom Lawson all became ill—on account of all which matters defendant in error was unable to perform his customary duties for a period of three months, and was deprived of the services of his wife and children for the like period, and was put to great expense for medical attention, all to his damage, \$3,000.

The declaration was subsequently amended by adding the following averment:

“The rise and fall of the river leaves large areas of land, on which large quantities of growing vegetation was negligently left by the defendant, covered,

and partially covered, by water, and defendant negligently failed, as was his duty, to provide proper drainage for this intermittent overflow, so that on account of such lack of drainage and the decay of such vegetable matter large areas of water became stagnant and foul, causing myriads of mosquitoes to be bred, and which, together with the foul odors and noxious smells referred to, caused the injuries complained of."

The plaintiff in error filed numerous pleas:

First, the general issue of not guilty; second, the statute of limitations of one year; third, accord and satisfaction; fourth, that the dam "was erected under the direction, control, and specifications of the United States government, in aid of navigation in the Tennessee river, and the work of constructing the said dam was done by the defendant as the agent of the United States government, and in the manner and form prescribed by it, and according to plans and specifications furnished by it, and under and by virtue of an act of Congress, approved April 26, 1904, chapter 1605, 33 Stat., 309, and upon an amended act of Congress, approved January 7, 1905, chapter 32, 33 Stat., 603, and that for any injury the plaintiff hath suffered as the result of said dam, his right, if any, is against the United States government, and not against the defendant;" fifth, "that the said dam is owned by the United States government, and has been owned and controlled by it since its completion, on or about the 5th day of October, 1913, and that this defendant has had no control over said dam since that date, and has

had since then no right or authority to interfere with said dam, or to change or modify any of the conditions which have been caused by the maintenance of said dam and the creation of the lake;" sixth, "that the said dam was constructed by it, as agent of the United States government, which had the same erected by this defendant under and by virtue of an act of Congress, approved April 26, 1904, and by an amended act of Congress, approved January 7, 1905, in aid of navigation in the Tennessee river, and that this defendant had no right or authority, previous to the construction of the dam and the overflow of the lands incident thereto, to go upon such lands and to clear the same from growing crops, trees, bushes, etc., as it was alleged in the declaration it was the duty of the defendant to do, and that the defendant therefore did not wrongfully and negligently allow such lands to be overflowed, as averred in said declaration, and that the damages complained of were caused by the United States government, as incident to the improvements in navigation in the Tennessee river, and not such damages as this defendant is liable for;" seventh, "that the injuries complained of are injuries brought about by the overflow of the lands in the condition in which they were at the time of such overflow, and that the owners of such overflowed lands have been fully compensated for all damages done to said overflowed lands, and that the defendant is not liable for the alleged injuries to plaintiff growing out of damages to lands which were taken by the said overflow and com-

pensated for and on behalf of the United States government in the condition in which the said overflowed lands were at the time of said taking, the same having been taken by such overflow in aid of navigation in the Tennessee river;" eighth, "that the said dam as described in said declaration, and that the work, and place of work, were at all times under the direction, supervision, and control of the United States government, its agents and servants, and that said dam was erected by this defendant in strict conformity to the plans and specifications furnished by the engineers of the United States government, and under their direction, supervision, and control; and since the completion of the same, about October 15, 1913, and the filling of the pool above said dam, the said United States government, its agents and servants, have been operating the said locks, and have had charge of all the work thereat, especially the lock and dam, and that this defendant has had no control of any part of said works, and has exercised no jurisdiction or control thereover since said time;" ninth, "that it was an independent contractor in building the dam described in the plaintiff's declaration, and, as such independent contractor, built the said dam in accordance with the plans and specifications furnished it by the United States government, its principal, and that it fulfilled its further duty to its principal, and carried out its contract with its principal and closed said dam, thus making this pool, and turned over to said government said work, on or about January 1, 1914, and as such

contractor it was never in possession of the river or the waters thereof, or any part thereof, nor of the works therein, and that the river and every part thereof and the works therein were in the possession and control of said United States government at all times during the building of said dam and after its completion."

Issue was duly joined on the pleas 2 to 9, inclusive.

In due course the case came on for trial, and after the evidence of the plaintiff below was heard the defendant moved for a peremptory instruction, and again after all the evidence was heard. Both motions were overruled. A verdict was rendered in favor of the plaintiff below for \$3,000, upon which a remittitur of \$1,000 was entered, and thereupon judgment was rendered for \$2,000, the balance left. On appeal to the court of civil appeals that court was of the opinion that the trial court committed error in refusing to sustain the motion for peremptory instructions last made, and, acting in accordance with this view, dismissed the action. The case was then brought to this court, by the writ of *certiorari*, and has been fully argued before us.

It should be stated, before further consideration of the case, that all of the grounds of relief stated in the declaration were practically abandoned in the evidence, except that one expressed in the amendment. The case was made to turn on the fact that the dam was so constructed that whenever there was a slight rise, say over six inches, in the river it would over-

flow the adjoining lands, and that, on the water receding, it left a pond embracing about a quarter or half of an acre, lying between the river and the defendant in error's home; that in this pond were bred *Anopheles* mosquitoes which attacked the defendant in error and members of his family, causing malaria; mosquitoes of the kind mentioned being well-known to science, and shown in the evidence, as carriers of malarial poison.

The learned court of civil appeals were of the opinion that it was impossible to say whether the mosquitoes that inoculated defendant in error and his family with the malarial poison came from the river or the pond, or from a spring branch close to defendant in error's house, or from water barrels near his neighbor's houses; therefore that there was no evidence to charge the defendant in error's injuries to the plaintiff in error.

There was evidence that prior to the filling of the dam, there had been very little malaria in the neighborhood, and none in defendant in error's family, although he had lived in the same place for several years prior to the construction of the dam; that after the filling of the dam and the overflow of the water, and the creation of the pond referred to, defendant and his family, in August, 1914, fell ill of malaria and continued to be ill from time to time; that defendant in error observed large numbers of mosquitoes at the pond; that before the construction of the dam and the overflow of the land there had been a few mosquitoes

in the house; that after the closing of the dam there were a sufficient number of mosquitoes in the house to make it necessary to "fight them," or defend one's self from them. Defendant in error testified that there had always been a few mosquitoes along the spring branch one hundred and fifty yards from the house. No one capable of distinguishing the *Anopheles* mosquito from other species, examined the mosquitoes in the pond. No one testified to having examined the pond for mosquitoes of this kind. Defendant in error was ignorant of the different species of the mosquito, and was unable to say whether any of them he saw at the pond, or in his house, were of the *Anopheles* kind. Several of his neighbors living from one-fourth of a mile to a mile from him were affected, also their families, as he and his family were affected in the summer of 1914. His home was within one hundred yards of the river, or lake, made by the river after the dam was closed. There was evidence that the pond created near the defendant in error's house was a place suitable for the breeding of the *Anopheles* mosquito. There is evidence that the edge of the lake or river was also a suitable place for the breeding of mosquitoes. Some examinations were made of the margin of the river, and no mosquitoes of the kind referred to were found there, but these examinations were made only after a rain or freshet, which was a very unfavorable time for the purpose, the water, under such circumstances, washing the larvæ away if any had been there. However, the pond near the house was

still water, and, as stated, there was evidence that this was a suitable place for the natural breeding of the poisonous mosquitoes mentioned. The pond referred to was on the land of one John L. McNab. Defendant in error's home was also on this same tract of land; he being a tenant at will of McNab. It seems that the defendant in error was a poor man, and McNab had told him some years before to go upon the land and fix up the house, and that he could stay there as long as he wished. He entered upon the land accordingly, and remained there under these terms. He occupied eight acres of the tract on which the pond rested. McNab's tract was on the bank of the river, or lake made by the dam. The lake also rested partly on the McNab tract. The pond, as stated, was between defendant in error's home and the river, and about thirty yards from the river. There is evidence that the pond could have been drained at slight expense; that is, by the digging of a ditch three feet deep and thirty yards long to the river on McNab's land, but that this ditch was not dug and the pond was not drained; that if it had been drained it would have done no injury in the way of breeding mosquitoes; that when the river overflowed this land it freshened the water and removed all cause of complaint, but that in times of low water, when the pond was disconnected from the river, it became stagnant and covered with a green scum, was offensive, and was a breeding place for mosquitoes.

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Mr. L. M. Pindell, a government expert, familiar with the different stages of the Tennessee river for a great many years, testified from government records that from January 1, 1879, down to December 31, 1913, a period of thirty-four years, there were one hundred and ten days that the ground where the pond is must have been covered with water; that in January, 1914, it was covered all but three days; in February every day but one; in March every day but five; that it was wholly covered during the month of April; that in May there were twenty-one days in which it was not covered; that it was not covered at all during the month of June; that in July there were five days that it was not covered, and in August one day; that in September it was covered only two days. No one testifies to having seen this ground actually covered during the dates mentioned, but the statement of the expert is made from the different stages of the river at Chattanooga, and the calculation of the difference between Chattanooga and the point where the pond was located. So it may be fairly inferred that the land was covered substantially as stated, and free at the times stated. The uncontradicted evidence is that the plaintiff in error settled with McNab for all injuries done to him and his land.

The dam was about forty-five feet high, and extended across the Tennessee river. On top of this dam the plaintiff in error constructed its power house. The Tennessee river being a navigable stream, it was necessary to procure the consent of the United States.

Accordingly an act of Congress was passed which, in effect, gave the plaintiff in error the right to construct the dam at its own expense, but under the direction of engineers of the United States, and with the proviso that the dam, when completed, should be turned over to the United States and should be its property, but that the plaintiff in error should have the right to use all surplus of water not needed for navigation in the production of electrical power for transmission to Chattanooga and other cities and places of consumption. It was also to be constructed, and was constructed, on plans furnished by the United States. The plaintiff in error was to pay, and did pay, all of the expenses of construction, and was to furnish, and did furnish, all of the materials except the iron doors of the lock. The right of the plaintiff in error to use the surplus water was subject to withdrawal at any time the United States might deem proper on the latter making a certain compensation specified in the contract.

A contract was entered into between the plaintiff in error and the United States according to the terms of the act, and this contract contained the following provision for indemnity; that is to say, that it should be the duty of the plaintiff in error "to hold and save the United States harmless from and against any and every demand or demands of any nature or kind, for or on account of the use of any patent, instrument, article, or process included in the materials hereby agreed to be furnished and the works to be done under

this contract, or on account of any damage to person or property resulting from the construction of said lock and dam."

Indeed the evidence fully sustains the averments of fact set forth in the fourth plea; also those contained in the fifth, except that it appears the plaintiff in error has, with the permission of the United States, from time to time erected flashboards on top of the dam to increase the amount of water retained in times of low water, and that it has from time to time, with the like consent, stopped leaks in the dam; that the flashboards were washed off in times of high water; with the further exception that the United States took charge January 1, 1914, instead of on October 5, 1913, as stated in the plea. The evidence fully sustains the facts averred in the sixth plea, understanding by the terms "right or authority" therein mentioned to refer to the fact that it does not appear that any such right or authority was conferred by the owner of the land. The evidence fully sustains the averments of fact contained in the seventh, eighth, and ninth pleas. There is no evidence controverting any of the foregoing averments. There is evidence to the effect that an ideal construction of the dam would have required the cutting down of all trees, in the inundated land; also the cutting out of corn stalks and other vegetation of the kind, the removal or burning of logs and the cutting of bushes and shrubs of all kinds; but it is further in evidence that at the time this dam was constructed, this was not recognized as being essential to a proper

construction, and that scientific knowledge upon the subject had not sufficiently advanced to justify the conclusion as to the ideal construction mentioned, but that the matter was still under the examination of experts. Plaintiff in error, before it closed the dam, did nothing towards destroying the growing vegetation, or timber on any part of the land that was overflowed by the rise of the river. The waters were backed out over it, and no effort was made to clean the bank of the river, or to cut away any of the brush around the margin of the river. The specifications furnished by the United States required no such thing to be done. The United States, through its officers, inspected every bit of the work, and the lines were run by its men. Its officers were in charge all the time.

Plaintiff in error's power house, as stated, was built on the dam. The substructure of the power house, being a part of the dam, was subjected to the government inspection. It does not appear that the power house itself was conveyed to the government.

From the facts stated, it is apparent that it is impossible for any one to determine whether the malaria in defendant in error's family was caused by mosquitoes from the river or from the pond, both being favorable breeding places, and each near enough to enable these insects to reach defendant in error's home. Although no mosquito of the species complained of was actually found in the margin of the river, or in the pond, no competent search having been made in either place under proper circumstances, yet, compar-

ing the condition of the health of the defendant in error and his family before the dam was closed and afterwards, and remembering that it is only the *Anopheles* mosquito that inflicts the injury; that they were in the neighborhood, since one or two larvæ were found in the spring branch—we think there was some evidence upon which the jury might have inferred that these mosquitoes were bred in the favorable places mentioned, that is, the margin of the river and in the pond. Both conditions resulted from the same cause, the building of the dam.

The overflow of the McNab lands on which the pond was formed was a natural and necessary incident of the construction of the dam.

We are of the opinion that the invasion of the McNab lands on which the pond rested in the manner set forth in the statement of facts was of such a character as amounted to an appropriation of the lands for flowage purposes.

The question now to be determined is whether, under these facts, the plaintiff in error was liable to the defendant in error for the sickness caused in his family by the river and the pond through the agency of the *Anopheles* mosquito, on the adjoining land.

We are of the opinion that there was no such liability, and that the motions for peremptory instructions in the trial court should have been granted and the suit dismissed.

The plaintiff in error was only a contractor, under the United States, doing for it the work that was done

for the improvement of navigation of the Tennessee river. The improvement, when completed, became the property of the United States. The plaintiff in error was guilty of no negligence, having performed the work strictly in accord with the specifications furnished to it by its employer. It is not material that the United States, instead of compensating plaintiff in error in money, paid it by permitting the use of the surplus water, and the granting of the right to place its power house on the dam. The same conclusion with regard to this public work was reached by the circuit court of appeals for the sixth circuit, in the case of *Chattanooga & Tennessee River Power Co. v. United States*, 209 Fed., 28, 126 C. C. A., 170, affirming the exhaustive opinion of Judge SANFORD in the district court. That controversy arose under an indictment against the power company for violation of the eight hour law (U. S. Comp. St. 1916, sections 8918-8920). The power company sought to treat the work as a private enterprise, primarily for its own benefit, in order to escape the effect of the law mentioned. It was held that the indictment was good on the grounds stated.

So the liability of the plaintiff in error must be measured by that of the United States. While the United States is liable for the taking of private property, and under its laws can be sued therefor, and for the incidental damages connected therewith involved in the taking, that is, the value of the land taken and the incidental damages to the residue of the tract out

of which it is taken, it cannot be sued for mere consequential damages. *United States v. Lynah*, 188 U. S., 445, 23 Sup. Ct., 349, 47 L. Ed., 539; *Gibson v. U. S.*, 166 U. S., 269, 17 Sup. Ct., 578, 41 L. Ed., 996; *Northern Transportation Co. v. Chicago*, 99 U. S., 640, 25 L. Ed., 336; *Scranton v. Wheeler*, 179 U. S., 141, 21 Sup. Ct., 48, 45 L. Ed., 126; *Union Bridge Co. v. U. S.*, 204 U. S., 364, 27 Sup. Ct., 367, 51 L. Ed., 523. Such injuries as might be suffered from the *Anopheles* mosquito breeding in the margin of the public waters of the United States, or in ponds created on lands habitually overflowed by it as the necessary result of the use of its public works would be such remote and consequential damages as it would not be liable for, as a part of the exercise of its right of eminent domain.

Furthermore, the incidence of such injuries would result, not so much from the fact of the construction of such a public improvement, as from the management thereof after its creation, since it appears from the evidence that the breeding places might be eradicated by cutting away the bushes and removing the debris on the bank of the river that would furnish shade and act as a means of preventing the wave motion of the water; also as to the pond, that it might be prevented by draining the pond. Of course, it is obvious that this removal of vegetation, and of obstructions, would have to be continued from time to time as the new growths would form between overflows, and new obstructions be deposited by the same agency. The failure to remove such obstructions, if

a ground of action at all to an adjoining owner, would be simply a tort, and the United States cannot be held liable for torts. Moreover, as to the remote and consequential character of such injuries, it is to be observed that it would necessitate inquiries as to whether the proper precautions had been used by adjoining owners in protecting themselves by screening their houses; it appearing from the evidence this is a precaution which tends to prevent the incursion of mosquitoes. The plaintiff in error contracted with the United States under section 3 of the contract quoted supra, that it would save the latter harmless "on account of any damage to person or property, resulting from the construction of said lock and dam." Under this agreement it could be held liable only for such damages as the United States would be liable for.

Furthermore, in respect of what has been said concerning the draining of the pond, it should be observed that although the United States had the right to appropriate the land of McNab for flowage purposes, it did not have the right, without McNab's consent, to go upon that land for a different purpose, that is, to drain the pond from time to time. *Railway Co. v. Telford*, 89 Tenn., 293, 14 S. W., 776. For a stronger reason plaintiff in error, its employee, had no such right. The default then, if any, of the United States, in respect of the matter was its failure to keep the margin of the lake free of shrubs and debris of all kinds, after it took possession of the property.

But it is said that the contractor is responsible in damages where the works erected by him are harmful to others as being dangerous to their health. That is to say, the suggestion is that if the works erected are a nuisance the contractor is not exonerated. This presupposes that public works erected by the United States under authority of Congress can be held a nuisance. This is an incorrect view. We think the true view is stated in Joyce on Nuisances, section 67; that:

“Works of internal improvement which have been erected by the United States for the benefit of its citizens do not become public nuisances from the fact that the neighborhood is thereby rendered unhealthy by the obstruction of running water, and a consequent overflowing upon adjoining land, and the character of such works is not changed by the fact that they are transferred to a private corporation which is required to maintain the same, for the purpose of their creation.”

For the same reason it could not be abated as a private nuisance at the suit of an individual. Furthermore, if the government has the right to erect public improvements it has the right to employ servants to do the work, and those servants cannot be sued where they act strictly in the line of their employment, executing the orders of the United States. If the rule were to the contrary, then it would be impossible for the United States to serve the public by the erection of great works of internal improvement for the benefit of all. The assertion is preposterous that a private

citizen could prevent the improvement of navigation by federal authority on the ground that mosquitoes would be bred on the margin of the stream, or in ponds created by necessary overflow. It is equally preposterous to say that the servants of the government, in executing, without negligence, the orders of the government, would be responsible to third parties on the ground that the government works would make the neighborhood unhealthy. In the nature of things the law can afford no relief under such circumstances. The only recourse that a sufferer can have is an application to the sovereign by petition for such amelioration of the hardship as it may choose to grant. 2 Wood on Nuisances (3 Ed.), section 763.

Now to apply the foregoing principles. The lock and dam was a work undertaken by the United States, and carried out through its agent, the plaintiff in error. The latter executed, in good faith, all of the employer's requirements, and was guilty of no negligence. It is not therefore responsible for the river banks and pond where the mosquitoes were bred that caused defendant in error's injury.

The predicate of the present suit is really that the United States so constructed the dam, that is, made it so high, as that in ordinary freshets it backed the water over the land of McNab, creating the pond; that although while these freshets themselves did no harm to defendant in error, yet on the retiring of the water the pond was left and the banks were left, and, these not being cleaned of bushes, and the pond not

being drained, by reason whereof the offensive mosquitoes were bred, the plaintiff in error is liable for the injury suffered, notwithstanding it acted in strict conformity with its employer's specifications and orders in all that was done, and notwithstanding the further fact that the injuries occurred by reason of failure to act on the part of the employer long after the property had passed into its hands, such supposed neglects consisting of the failure to trim off the bushes, and to drain the pond after the latter had come into full possession, and notwithstanding the further fact that this trimming of the bushes would have to be done from time to time as new growths might appear, and that the ditch would have to be reopened from time to time as it would fill up after each overflow. A mere statement of the contention shows how impossible it is to sustain it.

If McNab himself, the owner of the land on which defendant in error lives, were here complaining, he could have no relief, not only for the fundamental reasons already given, but also on the ground that he was fully paid for all injuries done to him and his land. It is true that if defendant in error were a tenant on any part of the land taken, he would be entitled to compensation to the extent that any part of his estate was appropriated. *Colcough v. Nashville & N. & W. R. Co.*, 2 Head (39 Tenn.), 171, 176. But no part of the eight acres of which he was a tenant was invaded by the overflow; so no part of it was taken. The

eight acres, as between defendant in error and plaintiff in error and the United States, must be treated as a tract separate from the rest of the McNab tract, of which it was really a part. So the question would be whether, treating the eight acres as a tract adjoining the one taken, the United States would be liable for the consequential damages inflicted by the breeding of mosquitoes on the land taken, by reason of its failure to clean and keep clean the river banks, and to drain and keep drained the pond referred to. That the United States could not be held liable we think has been fully shown. That if it could not be held liable plaintiff in error could not be held we think has also been shown; and for the further reason that the negligence, if there was any, was, so to speak, the negligence of the United States after it had received and taken charge of and was operating daily the lock and dam.

But it is insisted that the plaintiff in error has an interest in the property, and for that reason should be held liable. It is true it has, during the pleasure of the United States, an easement in the surplus water (that not needed for purposes of navigation), collected in the dam, received by it as compensation for erecting the dam for the benefit of the United States. This fact, however, can in no wise answer the objections already stated. It confers no control over the dam or influence in its operation, and in fact no such control, in whole or in part, exists, and no such influence

is exercised by plaintiff in error. This being true, there could be no responsibility, arising from mere ownership of the easement referred to.

It results that the judgment of the court of civil appeals, ordering a peremptory instruction dismissing the action, must be affirmed with costs.

MRS. MATTIE SHELTON *et al* v. CHICAGO, R. I. & P.
R. Co.

(Nashville. December Term, 1917.)

1. **RAILROADS.** Separate accommodations for races. Statutes. Construction.

The statute of Arkansas (Kirby's Dig., sections 6622-6625), requiring separate accommodations in certain cars for the use of white and African passengers, does not require a dining car to be partitioned with wood, nor that two separate dining cars be provided. (*Post*, p. 384.)

Acts cited and construed: Acts 1891, ch. 52.

Code cited and construed: Sec. 3074 (T.S.).

2. **STATUTES.** Construction.

A statute, when possible, should be given a construction making it sensible, without manifest inconvenience, so serious as to work injustice. (*Post*, pp. 384, 385.)

Cases cited and approved: *Maxey v. Powers*, 117 Tenn., 381; *Hall v. State*, 124 Tenn., 235.

3. **RAILROADS.** Separate accommodations for races. Statutes. Construction.

Under the Arkansas Statutes (Kirby's Dig., sections 6622-6625), as to separate accommodations for white and African passengers, it is sufficient if a railroad operating dining cars serves white persons at one time and the negroes at another without providing separate coaches. (*Post*, pp. 385, 386.)

Cases cited and approved: *Chiles v. Chesapeake, etc.*, R. Co., 125 Ky., 299; *Chesapeake, etc., R. Co. v. Wells*, 85 Tenn., 613.

4. **RAILROADS.** Separate accommodations for races. Statutes. Construction. Liability.

A railroad which maintained a dining car, intending to serve white and negro passengers at different hours, was liable to a

Shelton v. C., R. I. & P. R. Co.

white passenger, when it permitted negroes to be served while she was in the car, only for its negligence in making a call to the dining car for white persons at the time when negroes were about to be served. (*Post*, pp. 386, 387.)

5. **RAILROADS. Excessive damages.**

Where a railroad permitted negroes to be served while white passengers were in the dining car, on perceiving which plaintiff arose and left the car and the steward insisted in the hearing of others that she pay for the meal ordered, a verdict of \$750 was excessive and should be reduced to \$250. (*Post*, p. 387.)

FROM DAVIDSON.

Appeal from the Circuit Court of Davidson County.—A. G. RUTHERFORD, Judge.

W. H. WASHINGTON and J. C. VOORHEES, for appellants.

WRIGHT, MILES, WARRING & WALKER and W. H. BORSJE, for appellee.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

Mrs. Shelton brought this suit to recover damages, alleging that, while she was a passenger on defendant's railway between Memphis, Tenn., and Little Rock, Ark., the defendant failed to provide separate dining cars or a partitioned dining car as required, it was claimed, by an Arkansas statute, which provides

for the separate accommodation of the white and negro races. It was further alleged that the plaintiff as passenger was brought into involuntary association with members of the colored race by reason of the negligence of the railway company.

It appears that plaintiff, her husband and two sisters were passengers from Memphis to Little Rock, and that a waiter from the dining car passed through the sleeper occupied by plaintiff's party announcing a call to luncheon. Mr. Shelton was indisposed and did not desire food, but the three ladies immediately proceeded to the diner in response to the call. It appears that this was probably the third and last call, and when the ladies entered the dining car only a few white passengers remained at table, and these must have finished their meals at once. Mrs. Shelton, after writing out and handing in the meal order, glanced up and noticed two flashily dressed negro women enter the diner. They were shown seats, and were about to be served at the table in front of and next to the one occupied by plaintiff and her sisters. The white ladies entered into a discussion as to what they should do. About this time negro porters seated themselves and began to eat at the table next to that of the party in their rear, whereupon the ladies started from the car. The two sisters were in front and passed out of the dining car door, but Mrs. Shelton was stopped by the steward, who barred the way by holding the door of exit. He remarked to plaintiff:

"Those ladies (referring to the colored women) were in here when you came in." Mrs. Shelton, pushing his hand from the door knob got past the steward who, however, followed her into an intervening sleeping car next to the diner, and in a manner described as insulting demanded that the food ordered be paid for, in the presence and hearing of other passengers in that Pullman. Plaintiff passed on to the sleeper where her husband and sisters were. The steward still followed her, and offered to serve the order there, but repeated his statement: "Those colored ladies were in there when you came in; but I could not help that." This was resented by Mr. Shelton who had seen the colored women pass through his sleeper going towards the dining car some minutes after the women of his party had gone to luncheon. After some heated words were passed the steward withdrew.

Plaintiff was awarded judgment upon a verdict for \$750, which has been sustained by the court of civil appeals. The railway company has appealed, and insists that there is no liability; that if there be liability, nominal damages only should be allowed, and that in any event the verdict was excessive.

The Arkansas statute relied on appears as sections 6622 et seq. of Kirby's Digest, as follows:

"Sec. 6622. All railway companies carrying passengers in this State shall provide equal but separate and sufficient accommodations for the white and African races by providing two or more passenger coaches for each passenger train; provided, each railway com-

pany carrying passengers in this State may carry one partitioned car, one end of which may be used by white passengers and the other end by passengers of the African race, said partition to be made of wood, and they shall also provide separate waiting rooms of equal and sufficient accommodation for the two races, at all their passenger depots in this State.

“Sec. 6623. The foregoing section shall not apply to street railroads. In the event of the disabling of a passenger coach, or coaches, by accident or otherwise, said company shall be relieved from the operation of this act until its [his] train reaches a point at which it has additional coaches.

“Sec. 6624. No person or persons shall be permitted to occupy seats in coaches, or waiting rooms, other than the ones assigned to them, on account of the race to which they belong; provided, officers in charge of prisoners of different races may be assigned with their prisoners to coaches where they will least interfere with the comfort of other passengers; provided further, that section 6622 shall not apply to employees of a train, in the discharge of their duties, nor shall it be construed to apply to such freight trains as carry passengers.

“Sec. 6625. Carriers may haul sleeping or chair cars for the exclusive use of either the white or African race, separately, but not jointly.”

We have in this State a separate coach statute which is quite similar to the one above quoted. Act 1891, chapter 52; Thompson's Shannon's Code, section 3074

et seq., but it does not appear that, either in Arkansas or in this State, the statute has been construed in respect of its application to a dining car carried as a part of a train for the accommodation of passengers. We have not been cited, and we have not found, any reported case in other jurisdictions which treats of that phase of separate coach laws.

Evidently the Arkansas statute, like our own, was passed before dining cars were brought into use. The statute to be construed does specifically mention in section 6625 sleeping cars and chair cars, which were at the time in general use; and it is observed that no partition into separate sections of those particular cars is stipulated; but to the contrary such, it is provided, may be hauled for the exclusive use (in its entirety) of either race, separately but not jointly. Statutes of later date passed in other States do deal with the modern dining car. Thus, in the Oklahoma statute, passed December 18, 1907, dining cars are mentioned in connection with sleeping cars and chair cars, "to be used exclusively by either white or negro passengers, separately but not jointly." Laws 1907-08, Okl., chapter 15, section 7.

We are of opinion that the Arkansas statute did not undertake to prescribe that dining cars should be divided into two compartments or sections by wooden partitions. Section 6622 refers to a passenger day coach, in which, but for the separation made incumbent on common carriers, the two races would be thrown together during a journey. That separation might be

by way of providing two passenger coaches, one for each race, or "one partitioned car." Sleeping cars, as said, are dealt with in a distinct manner; dining cars not at all.

We, therefore, are of opinion that the lower courts were incorrect in holding that the defendant company's dining car was governed by the statute and required to be partitioned, the partition to be of wood, or two separate dining cars provided.

The construction of the statute contended for by plaintiff might be so onerous on railway companies as to lead to consequences not desirable for either race, the abandonment of dining cars in certain trains, and on those railroads which would not be justified in going to the expense of maintaining separate diners, and find it impracticable to partition one of them. In this case a full-length dining car was not operated—only one-half of a car was found necessary for and devoted to buffet service—and it would be quite out of the bounds of reason to subdivide this space into two compartments, as a practical proposition.

A statute, when possible, should not be given a construction that would make it not sensible, or that would lead to manifest inconvenience, so serious as to work injustice. *Maxey v. Powers*, 117 Tenn., 381, 101 S. W., 181; *Hall v. State*, 124 Tenn., 235, 137 S. W., 500.

When, therefore, dining cars were introduced they were the subjects of regulation by the railway companies as to the use to be made of them by passen-

gers of the white and negro races, under common-law power to that end.

It appears, however, that the defendant railway company had established a rule for the purpose of providing equal, but separate and sufficient accommodation in its dining cars for the two races. The partition it made of the car for use was by hours during which members of the respective races might resort to the dining car for food. It seems to us that this rule was not only reasonable, but that it was a wise and fair one, and perhaps the best that in the circumstances could be adopted to serve the same ends the legislatures had in mind when they enacted laws in relation to separation of the races in passenger coaches. The rule of the railway company in operation was that white passengers were served first; three separate meal calls were made in the day coaches and sleepers for the white passengers. If there were any negro passengers desiring the meal, they were not served until the lapse of a reasonable time following the making of the last call when there was no probability of other white passengers coming into the car for service. In our opinion we should not read into the statute anything that would prevent such a just regulation by the carrier, unless compelled to do so. The rule admits of railway trains maintaining schedules that are not slowed down by stops for roadside meals, and it does not lead to denial of meals to members of either race, or to unreasonable inconveniences.

A State legislature may very wisely deem regulation of dining cars by rules of the carrier, rather than by statute, advisable.

The right of a carrier, at common law, to make reasonable rules for the separation of passengers belonging to different races, observing the condition of equality of accommodations, has often been sustained by the State courts. *Chiles v. Chesapeake, etc., R. Co.*, 125 Ky., 299, 101 S. W., 386, 11 L. R. A. (N. S.), 268, and cases collected in note; and see *Chesapeake, etc., R. Co. v. Wells*, 85 Tenn., 613, 4 S. W., 5.

And in the *Chiles Case*, on writ of error, the supreme court of the United States held that this was true even as to interstate passengers, where there is congressional inaction in that regard. 218 U. S., 71, 30 Sup. Ct., 667, 54 L. Ed., 936, 20 Ann. Cas., 980 and note.

We hold that a recovery by the plaintiff in the pending case must be upheld on the ground that the evidence shows liability on the part of the railway company, under the above rule, in that there was negligence in the making of the call for white passengers to go into the dining car for luncheon at a time when negro passengers and train employees were about to be or were being served. Plaintiff's proof is that she went to dining car immediately after a call to luncheon had been cried in her car. The dining car steward was negligent in not stopping her and explaining the error if the call had in fact been made by mistake, in permitting the situation to grow more involved in the circumstances shown and in his later treatment of Mrs.

Shelton when he barred her passage and followed her into the sleeping car, as set out above.

But the court is of opinion that the verdict was excessive, and that \$250 is a proper allowance under the conditions appearing. A remittitur of \$500 is suggested; and in event it is accepted, an affirmance of the judgment below is ordered. On refusal, a reversal and remand for a new trial results. Costs of the appeal will abide the event.

E. M. HAMMOCK v. A. B. QUALLS.*(Nashville. December Term, 1917.)***1. JUSTICES OF THE PEACE. Executions. Liens.**

The levy of an execution from a justice's judgment upon land creates a lien in favor of the judgment creditor. (*Post*, pp. 391, 392.)

Cases cited and approved: *Zook v. Smith*, 65 Tenn., 213; *Parker v. Swan*, 20 Tenn., 83; *Keaton v. Thomasson*, 32 Tenn., 139.

2. EXECUTION. Liens. Date.

If the levy of an execution from a justice's judgment is followed by condemnation and issue of *venditioni exponas* by the circuit court, the sale had in pursuance thereof relates back to the date of the levy, and the legal title conveyed by the sheriff's deed operates from that date. (*Post*, pp. 391, 392.)

3. EXECUTION. Real estate. Effect of levy.

The levy of an execution upon real estate does not transfer the title to the land, nor create any interest in the sheriff, but merely fixes a lien upon the land for the payment of the debt. (*Post*, p. 392.)

4. EXECUTION. Lis pendens. Effect.

While the record of the condemnation in the circuit court after levy of execution on a justice's judgment is constructive notice of the sheriff's sale, the order of condemnation is not a judgment establishing a lien, but only a mode of executing the levy. (*Post*, p. 392.)

Cases cited and approved: *Mann v. Roberts*, 79 Tenn., 59; *Ashworth v. Demier*, 60 Tenn., 323.

5. EXECUTION. Lis Pendens. Effect.

The record of condemnation in the circuit court after levy of execution under a justice's judgment merely continues the lien of the levy to which the purchaser's title will relate when he procures a deed from the sheriff. (*Post*, p. 392.)

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6. EXECUTION. *Lis pendens*. Effect.

The only proper use of an execution being to enforce with diligence the collection of a debt, the creditor cannot use it merely as security for his debt by a levy on the property which creates merely a secret lien. (*Post*, pp. 392, 393.)

Case cited and distinguished: *Wilkins v. McCorkle*, 112 Tenn., 688.

Code cited and construed: Sec. 3751(S.).

7. VENDOR AND PURCHASER. Priority of deeds. *Lis Pendens*.

In all cases subject to the registration laws, the deed first registered has priority over constructive notice of *lis pendens*. (*Post*, pp. 393, 394.)

Case cited and approved: *Shelton v. Johnson*, 36 Tenn., 680.

8. LIENS. Secret liens.

Secret liens are not favorites of the law. (*Post*, pp. 394, 395.)

9. EXECUTION. Rights of purchaser. Reasonable diligence.

Reasonable diligence is required of the purchaser at an execution sale in perfecting his title, which should be recorded. (*Post*, pp. 394, 395.)

10. VENDOR AND PURCHASER. Rights of purchaser. Reasonable diligence.

Ordinary negligence in procuring a sheriff's deed, unexplained, should defeat the title of the execution purchaser as against one who buys in good faith and without notice of the title claimed by the execution purchaser. (*Post*, pp. 394, 395.)

11. EXECUTION. Rights of purchaser. Reasonable diligence.

No positive rule can be stated as to what constitutes such delay of an execution sale purchaser in getting a sheriff's deed as will destroy the right to *lis pendens*, but one relying upon the rule must understand that his claim is *strictissimi juris*. (*Post*, p. 395.)

Case cited and approved: *Robinson v. Bierce*, 102 Tenn., 428.

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12. EXECUTION. Vendor and purchaser. Rights of purchaser. Reasonable diligence.

Where the purchaser at a sale under condemnation by the circuit court after levy of a justice's judgment delayed getting a sheriff's deed for over eight years, his delay was a gross negligence, amounting to an abandonment of his lien, and a subsequent purchaser without notice, who recorded his deed, had superior title, though the purchaser finally took a deed; such deed not relating back to the levy. (*Post*, pp. 395, 396.)

FROM OVERTON.

Appeal from the Chancery Court of Overton County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.
—A. H. ROBERTS, Chancellor.

E. C. KNIGHT, for appellant.

W. R. OFFICER and E. A. QUALLS, for appellee.

MR. JUSTICE LANSDEN delivered the opinion of the Court.

This case is before us upon petition for writs of *certiorari* to the judgment of the court of civil appeals reversing the decree of the chancellor. The bill is filed by Hammock for the purpose of having a claim of Qualls to an undivided one-fifth interest in a certain tract of land in Overton county removed as a cloud upon his title. The common source of title is one Bil-

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brey, who held by descent from his father. After the death of Bilbrey's father, complainant Hammock sued Bilbrey before a justice of the peace, and recovered a judgment. An execution issued thereon July 11, 1908. An order of condemnation and sale were had upon the justice's proceedings in the circuit court of Overton county November 3, 1908, and deed of the sheriff pursuant thereto October 17, 1916. After the sale, and before the execution of the deed by the sheriff, defendant purchased the same land from Bilbrey by deed dated November 1, 1915, which was registered in Overton county on the same day.

The defendant interposed as defenses to complainant's action that he purchased the land without notice of complainant's purchase at the sheriff's sale, or his levy lien, and the inexcusable and unexplained delay upon the part of complainant in taking his deed from the sheriff.

The case was heard by the chancellor sitting as a jury, who found that the defendant purchased from Bilbrey without notice in fact of the proceedings under which complainant claims. There is evidence to support this finding.

The levy of an execution from a justice's judgment upon land creates a lien in favor of the judgment creditor. *Zook v. Smith*, 6 Baxt., 213. If the levy is followed up by a return of the papers into the circuit court and a condemnation of the land, and *venditioni exponas* is issued by order of the circuit court, the sale, had in pursuance thereof, will relate back to

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the date of the levy so as to make the legal title conveyed by the sheriff's deed operate as of the date of the levy lien. *Parker v. Swan*, 1 Humph., 83, 34 Am. Dec., 619; *Zook v. Smith*, supra; *Keaton v. Thomason*, 2 Swan, 139, 58 Am. Dec., 55.

The levy of an execution upon real estate does not transfer the title to the land nor create any interest thereto in the sheriff. It merely fixes a lien upon the land for the payment of the debt. *Keaton v. Thomason*, supra.

The court of civil appeals was of opinion that the record of the condemnation in the circuit court was constructive notice to the defendant of the sheriff's sale, and of complainant's equity in the land by virtue of a *lis pendens* growing out of the condemnation proceedings. This is correct as a general proposition of law, but the order of condemnation is not a judgment, but only a mode of executing the levy. *Mann v. Roberts*, 11 Lea, 59; *Ashworth v. Demier*, 1 Baxt., 323; *Zook v. Smith*, supra.

In *Mann v. Roberts*, supra, it is stated that the record of condemnation "is not notice to third persons, nor would it be if a judgment; the notice implied from a pending litigation ceasing with its determination." It merely continues the lien of the levy to which title of the purchaser at the sale will relate when he procures a deed from the sheriff.

"The only proper use of an execution," said the court in *Mann v. Roberts*, supra, "is to enforce the collection of a debt, and to enforce it, so far as the rights

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of third persons are concerned, with reasonable diligence. The creditor cannot use it merely as a security for his debt by a levy on property, for the lien thus created is a secret lien, and may operate to the prejudice of innocent third persons if the debtor be left in possession of the property." This we conceive to be an accurate statement of the nature and purpose of an execution upon a justice's judgment when levied upon real estate. Our registration statutes have been enacted for the purpose of preserving titles to land and giving notice to a prospective purchaser of the manner in which they are held. Our Code, at section 3751 (Shannon) expressly provides as follows:

"Any of said instruments first registered or noted for registration shall have preference over one of earlier date, but noted for registration afterwards, unless it is proved in a court of equity, according to the rules of said court, that the party claiming under the subsequent instrument had full notice of the previous instrument." *Wilkins v. McCorkle*, 112 Tenn., 688, 80 S. W., 834.

In all cases to which our registration laws have application, the deed first registered must be given priority over the constructive notice of *lis pendens*. The doctrine of notice by *lis pendens* by which a *bona-fide* purchaser without notice is held bound by the result of a suit as though he had notice is held, in *Mann v. Roberts*, *supra*, to be one of public policy, and necessary to bring litigation to an end. In *Shelton v. Johnson*, 4 Sneed, 680, 70 Am. Dec., 265, it was thought the doctrine should be placed upon the ground of notice,

either actual or constructive, but it was also said that the rule is founded more upon the necessity for it to give effect to the proceedings of courts than upon any presumption of notice. All of the authorities agree that the rule is necessary, and that without it all suits for specific property might be rendered abortive by successive alienations of the property in suit. Authorities *infra*.

As shown heretofore by our cases, the condemnation proceedings is not a judgment, nor does it fix a lien, but it is intended merely to continue the lien fixed by the levy of the execution upon the land, which until condemnation is a secret one. Secret liens are not favored, and it was designed by the legislature, in passing our condemnation statutes, to preserve of record proceedings had before justices of the peace by which the lien of the levy of the execution was obtained. The date between final order of sale, the sale and the return thereof, and the execution of a deed by the sheriff, does not create a *hiatus* in the operation of the *lis pendens* of the condemnation proceeding. The *lis pendens* is operative for a reasonable time after sale until deed of the sheriff is obtained, and purchasers in good faith without notice are bound to take notice of the levy lien so recorded. But reasonable diligence is required of the purchaser at the execution sale in perfecting his title, which should be recorded. In *Mann v. Roberts*, *supra*, the opinion was expressed that the lien will not "perhaps" be impaired by ordinary negligence, and will only be lost by unusual and

unreasonable delay. In so far as this refers to delay which may be explained, we assent to it, but we think that ordinary negligence in procuring a sheriff's deed, unexplained, should defeat the title of the execution purchaser as against one who buys in good faith and without notice of the title claimed by the execution purchaser.

No positive rule can be laid down as to what constitutes such delay as will destroy the right to *lis pendens*, and the question must be determined upon the facts of each particular case. *Robinson v. Bierce*, 102 Tenn., 428, 52 S. W., 992, 47 L. R. A., 275, 17 R. C. L., 1038. The cases generally hold that the rule of *lis pendens* is a harsh and oppressive one when given operation against a *bona-fide* purchaser without notice. One relying upon the rule must understand that his claim is *strictissimi juris*. 25 Cyc., 1452, 17 R. C. L., 1038, 1039.

In the case under consideration the complainant waited for more than eight years before procuring a deed from the sheriff. Everything that was to be done in the condemnation proceedings, or in the suit before the justice, had been done, and more than likely the book containing the record of the condemnation had long since been retired in the clerk's office. While it is true under our cases that the defendant had constructive notice of the condemnation proceedings, the conduct of the complainant toward the lien procured by the levy of his execution was such as warranted the defendant in assuming in law that the complainant

had abandoned his lien, and did not intend to take a deed from the sheriff. This delay, unexplained as it is, is gross negligence upon the part of complainant, and amounts to an abandonment of his lien. This being so, the deed which he finally took from the sheriff could not be said to have relation to the lien because it was abandoned. It should be borne in mind that the lien was secret until condemnation proceedings were had, and it never conferred any title upon complainant, but merely gave him the right to proceed according to law, and ripen his lien into a title. In order to do this, so as to overreach the rights of subsequent purchasers without notice who have registered their deeds, the levy lienor must follow up his execution with reasonable diligence and ripen his lien into a title. The law gives a creditor such relief against his debtor, but it was not intended that such a proceeding could be suspended for an unreasonable length of time and then affect the rights of innocent third parties. Such we think is the holding of our cases as well as those of other jurisdictions.

The result is that the writ is granted, and the decree of the court of civil appeals is reversed, and that of the chancellor is affirmed.

WILES BROS. & COMPANY v. THOMAS F. WYNNE *et al.*

(Nashville. December Term, 1917.)

1. EXECUTORS AND ADMINISTRATORS. Funeral expenses. Allowance.

A charge of \$1,000 by an undertaker for a casket which cost it only \$307 was exorbitant, and was properly reduced. (*Post*, pp. 398, 399.)

2. EXECUTORS AND ADMINISTRATORS. Allowances. Funeral expenses.

An expenditure of \$1,332 for the funeral of a person who had been an imbecile and inmate of an asylum for years, whose estate was less than \$10,000 was unwarranted. (*Post*, p. 399.)

3. EXECUTORS AND ADMINISTRATORS. Funeral expenses.

In the absence of any direction in the will, an executor or administrator has the right to use his discretion in incurring funeral expenses, but the amount must be reasonable. (*Post*, p. 399.)

Cases cited and approved: *Gooch v. Beasley*, 137 Tenn., 407; *Steger v. Frizzell*, 2 Tenn., Ch., 369.

4. EXECUTORS AND ADMINISTRATORS. Funeral expenses. Personal liability.

The mere fact that an administrator, or other person, wrote "O. K." on an undertaker's bill, did not bind him personally, because to bind a person making arrangement for the burial of another it should distinctly appear that he agreed to pay the debt. (*Post*, pp. 399, 400.)

Code cited and construed: Sec. 4090, subsec. 2. (T.S.)

Wiles Bros. & Co. v. Wynne.

FROM DAVIDSON.

Appeal from the Chancery Court of Davidson County.—JNO. ALLISON, Chancellor.

STOKES & STOKES, for appellant.

JNO. T. LELLYETT, for appellees.

MR. JUSTICE FENTRESS delivered the opinion of the Court.

Complainants are undertakers, and seek, by their bill, to recover from Thomas F. Wynne, personally, and the Nashville Trust Company and Thomas F. Wynne as joint administrators of the estate of John Wynne, \$1,332 for funeral expenses incurred in the burial of the deceased.

The defendant Wynne denies that he contracted to personally pay the complainants, and the administrators contest the claim upon the ground that it is exorbitant.

The chancellor rendered a decree for \$700 against the estate of the deceased and dismissed the bill as to Thomas F. Wynne, and the complainants have appealed to this court.

Attached to the bill is an itemized account of the claim. The largest of these items is \$1,000 for a black cloth, copper-lined casket. It is admitted that

this casket cost the complainants \$307. Thus it appears that on this single item the profit sought is \$693. There is no proof adduced as to the reasonableness of the other items, but it is quite apparent to the court that the prices charged for many of these articles are excessive.

We think the claim is exorbitant, and that the chancellor was correct in disallowing it. His decree for \$700 in favor of the complainants is full compensation for the services rendered and articles furnished for the burial of the deceased.

There was no occasion for an expensive funeral. The proof shows the estate was less than \$10,000 in value, and that, for a number of years prior to his death, the deceased was an imbecile and an inmate of an asylum. An expenditure of \$1,332 for the funeral of such a person is an unwarranted extravagance.

It is the law in this State that, in the absence of any direction in the will, an executor or administrator has the right to use his discretion in incurring funeral expenses; however, the amount must be reasonable. *Gooch v. Beasley*, 137 Tenn., 407, 193 S. W., 132; *Steger v. Frizzell*, 2 Tenn. Ch., 369. What good can be accomplished by a lavish expenditure of money for such a purpose?

Defendant Wynne is sought to be held personally liable upon the ground that he selected the casket and after the burial wrote "O. K." upon the bill. He admits he selected the casket, but denies that anything was said about his paying the expenses of the

funeral, and that when he wrote "O. K." upon the bill he was suffering intensely from a recent injury and had no idea that complainants desired to fix liability upon him.

We are of the opinion that, before the person who makes arrangements for the burial of another is held liable for the expense incurred, it should distinctly appear that such person agreed to pay the debt. Funeral expenses are a debt against the estate of a decedent, and, even where the estate is insolvent, by statute (Thompson's Shannon's Code, section 4090, subsection 2), are made a preferred claim.

When a person dies, frequently relatives, friends, or neighbors make the funeral arrangements, with no thought of incurring personal liability for the payment of the expense. To hold that the performance of this humane service, generally actuated by motives of esteem for the deceased and a desire to relieve the bereaved family of the unpleasant duty, makes such a person liable for the undertaker's claim, would be a subversion of justice.

The decree of the chancellor is affirmed, and the costs adjudged against complainants.

GENERAL REFINING & PRODUCING CO. v. DAVIDSON
COUNTY *et al.*

(*Nashville*. December Term, 1917.)

LICENSES. Privilege tax. Oil tanks.

Revenue Law (Laws 1915, chapter 101), imposing a tax on persons having oil tanks, etc., for the purpose of selling, delivering, or distributing oil, is inapplicable to a petroleum manufacturer and refiner maintaining storage tanks merely as a part of its manufacturing establishment and making only a manufacturer's profit.

Cases cited and approved: *Bell v. Watson*, 71 Tenn., 328; *Druggist cases*, 85 Tenn., 449; *Memphis v. American Express Co.*, 102 Tenn., 336; *Chattanooga Plow Co. v. Hays*, 125 Tenn., 148; *Gulf Refining Co. v. Chattanooga*, 136 Tenn., 505.

FROM DAVIDSON

Appeal from the Chancery Court of Davidson County.—JAS. B. NEWMAN, Chancellor.

DOUGLAS & NORVELL, for appellant.

M. P. O'CONNOR and NORMAN FARRELL, JR., for appellees.

MR. JUSTICE LANSDEN delivered the opinion of the Court.

The bill in this case was filed to enjoin Davidson county from proceeding to collect a privilege tax

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from the complainant and to recover back a privilege tax of like amount which it had paid to the State under protest. The chancellor held that complainant was liable for the tax under consideration and dismissed its bill. It appealed to this court and has assigned errors.

We take the following statement of the facts of the case, together with the reasons assigned in support of the claim against complainant, from the brief of defendant's learned counsel:

"The appellant is engaged in manufacturing and refining petroleum and its by-products in Nashville. It maintains storage tanks in which the manufactured product is stored until sold. It sells its product at the refiner's price, not at the retailer's price.

"The only question presented in the record is: Is appellant liable for the privilege tax imposed by the Revenue Act of 1915?

"That act, so far as it is applicable to this controversy, reads as follows:

" 'Coal Oil, Illuminating Oil, or Lubricating Oil, or Petroleum Products.

" 'Each and every person, firm, partnership, corporation, or local agent having oil depots, storage tanks, or warehouses for the purpose of selling, delivering or distributing oil of any description, . . . shall pay a privilege tax as follows:

" 'In cities, towns or taxing districts of 30,000 inhabitants or over, or in territories within five

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miles of the limit of such town, or taxing district, each per annum \$500.'

"It is the insistence of the appellees that the keeping of storage tanks for the purpose of selling, delivering, or distributing oil is a privilege to be taxed within the meaning of the act, no matter whether the storage and sale be by a manufacturer who gets only a manufacturer's profit, or by a wholesaler or retailer who gets only a selling profit.

"The appellant in this case makes or refines the oil, keeps tanks in which it stores the oil, and sells the oil at the manufacturer's price. The wholesaler buys the oil, stores it in tanks, and sells it at the wholesale price for a wholesaler's profit only. The retail dealer buys the oil, stores it in tanks, and sells at the retail price for a retail profit only.

"Each of the three maintain storage tanks from which they sell oil, for only one profit each. The wholesaler and retailer pay the tax. Why should the manufacturer escape the tax merely because he refines the oil and puts it in tanks, while the others buy the oil and put it in tanks? The source from which the refined oil is derived, i. e., manufactured or bought, can make no difference. They are all equally covered by the language and intent of the act."

From this statement it will be observed that complainant uses storage tanks for the purpose only of storing crude oil, and the manufactured product, as containers for the purpose of confining the oil in order that it may sell it as a manufacturer. Oil is

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an elusive substance which must be confined in tanks as containers in order to preserve it. Open tanks are dangerous on account of fire, and the tanks employed are merely in use as containers. Thus it will be seen that the tanks and the storage of the oil in them are integral parts of complainant's business as a manufacturer. It cannot be denied that the refined oil is stored in the tanks for purposes of sale, but it is agreed that the sale contemplated by complainant is a sale for the purpose of realizing the manufacturer's profit. The complainant has paid a manufacturer's tax. *Bell v. Watson*, 3 Lea, 328; *Druggist Cases*, 85 Tenn., 449, 3 S. W., 490; *Memphis v. American Express Co.*, 102 Tenn., 336, 52 S. W., 172; *Chattanooga Plow Co. v. Hays*, 125 Tenn., 148, 140 S. W., 1068; *Gulf Refining Co. v. Chattanooga*, 136 Tenn., 505, 190 S. W., 463.

The principle underlying the above cases is that, if a construction can be given the statute levying the tax consistent with the language employed by the legislature so as to avoid double taxation, this construction will be given.

In the case under consideration, the legislature levied a privilege tax for having oil depots, storage tanks, or warehouses for the purpose of selling, delivering, or distributing oil. The fact merely of having oil depots, storage tanks, and warehouses is not sufficient to make one liable for the tax; but the depots, tanks, and warehouses must be kept primarily for the purpose of selling the oil. In this case, under

the agreed statement, the tanks are owned by the complainant as an integral part of its business of manufacturing oil and for the purpose only of containing the oil in order that complainant may realize the profits earned as a manufacturer. The oil tanks in this case are not different from the warehouses in the case of *Chattanooga Plow Co. v. Hays*, and the complainant is no more liable for a tax for keeping the tanks than the plow company was for a tax for having its warehouses.

We are not considering the power of the legislature to make the ownership of oil tanks in connection with the refining business a separate privilege, but what we are saying is that the language employed in the act under consideration does not do so. The tanks must be kept for "the purpose of selling, delivering or distributing oil" before the taxpayer is liable for the tax. If they are kept as an integral part of a business upon which the tax has been paid, we think the legislature did not mean to tax them. The decree of the chancellor is reversed, and the injunction prayed for is granted and made perpetual.

STATE *ex rel.* H. T. STEWART, State Revenue Agent,
v. LOUISVILLE & N. R. Co. *et al.*

(Nashville. December Term, 1917.)

1. **TAXATION. Statutes. Construction.**

Tax statutes will be construed most strongly against the State.
(*Post*, p. 412.)

2. **STATUTES. Construction. Pari materia.**

Statutes in *pari materia* will be construed together, and the whole statute considered in determining its true meaning. (*Post*, p. 412.)

Cases cited and approved: *Memphis v. Bing*, 94 Tenn., 644; *English v. Crenshaw*, 120 Tenn., 531; *Knox v. Emerson*, 123 Tenn., 409; *Crenshaw v. Moore*, 124 Tenn., 531; *O'Neil v. State*, 115 Tenn., 427; *Wingfield v. Crosby*, 45 Tenn., 241; *Lewis v. Mynatt*, 105 Tenn., 508; *State v. Railroad Co.*, 84 Tenn., 136; *State v. Manson*, 105 Tenn., 233; *Pond v. Trigg*, 52 Tenn., 533; *Graham v. Gunn*, 87 Tenn., 458; *Heiskell v. Lowe*, 126 Tenn., 475.

3. **TAXATION. "Privilege Taxes." What constitutes.**

Revenue Act 1915 (Laws 1915, chapter 101) sections 8 and 10, taxing transfers of realty and corporations acquiring the property of another corporation, impose privilege taxes. (*Post*, p. 413.)

Cases cited and approved: *Mabry v. Tarver*, 20 Tenn., 94; *French v. Baker*, 36 Tenn., 193; *Clarke v. Montague*, 71 Tenn., 277; *State v. Schlier*, 50 Tenn., 281; *Jenkins v. Ewin*, 55 Tenn., 456.

4. **TAXATION. Statutes. Double taxation.**

Statutes creating privileges will be construed so as not to impose double taxation, unless such construction is expressly or impliedly required. (*Post*, pp. 413-416.)

Cases cited and approved: *Druggist Case*, 85 Tenn., 449; *Memphis v. Express Co.*, 102 Tenn., 336; *Chattanooga Plow Co. v. Hays*, 125 Tenn., 148; *General Refining & Producing Co. v. Davidson County et al.*, 201 S. W., 737.

5. TAXATION. Privilege taxes. Railroads.

A railroad which paid a tax imposed by Revenue Act 1915, section 10, on corporations acquiring the property of another corporation, is also liable for the tax imposed by section 8 upon all transfers of realty, since such sections impose different taxes and double taxation does not result. (*Post*, pp. 416-418.)

Cases cited and approved: *Street Railway Co. v. Morrow*, 87 Tenn., 406; *Knoxville v. Sanford*, 81 Tenn., 545; *Cigar Co. v. Cooper*, 99 Tenn., 472.

Code cited and construed: Secs. 2330, 2438. (T.-S.).

6. TAXATION. Privilege tax. Railroads.

Under Code 1858, section 51, defining land, a railroad acquiring the property of another corporation is liable for the tax imposed by Revenue Act 1915, section 8, on all transfers of realty, although railroad property is merely incident to its use as a highway. (*Post*, pp. 419, 420.)

7. TAXATION. Collection. Sufficiency of bill.

A bill to enforce a transfer tax upon realty imposed by Revenue Act 1915, section 8, which alleged that the property was mortgaged for a certain sum and was worth considerably more, held not insufficient because not stating the property's true value. (*Post*, p. 420.)

8. TAXATION. Collection. Prima-facie evidence.

In a suit to collect a real estate transfer tax imposed by Revenue Act 1915, section 8, the value of the property stated in the deed is only *prima-facie* evidence of its true value. (*Post*, p. 420.)

Case cited and approved: *Hitt v. Coal Co.*, 201 S. W., —.

9. TAXATION. Transfer tax. Collection.

Where a railroad pays the transfer real estate tax imposed by Revenue Act 1915, section 8, upon property extending through several counties, the tax need be paid only to the clerk of the county court of the county in which the deed to the land involved is first registered. (*Post*, pp. 420, 421.)

FROM DAVIDSON

Appeal from the Chancery Court of Davidson County.—JAS. B. NEWMAN, Chancellor.

BARTHELL, HOWELL & O'CONNOR and W. P. COOPER,
for appellant.

KEEBLE & SEAY and F. M. BASS, for appellee.

MR. JUSTICE LANSDEN delivered the opinion of the Court.

The bill was filed by the State of Tennessee upon the relation of its revenue agent for the purpose of collecting from the defendants, the Lewisburg & Northern Railroad Company and the Louisville & Nashville Railroad Company, a transfer tax provided for by section 8 of the Revenue Act of 1915. The bill alleges that on October 1, 1915, the Lewisburg & Northern Railroad Company executed a deed to the Louisville & Nashville Railroad Company for its entire line of railroad situated in Davidson, Williamson, Rutherford, Marshall, Giles, and Lincoln counties, and particularly described as follows:

“First. A double track main line railroad, commencing at the junction of the main line of the Lewisburg & Northern Railroad with the main track

of the main stem, second division, of the Louisville & Nashville Railroad at or near Maplewood Station in the county of Davidson and State of Tennessee, and extending in a general southerly direction a distance of 10.62 miles to the connection of said main line with the main line of the Nashville & Decatur Railroad at or near Mayton in said Davidson county, on which portion of its line the said Radnor Yards is located, embracing approximately forty-four miles of track, and an area of property of approximately three hundred acres, said yard lying between Mayton and a point two and three-fourths miles north thereof. Contiguous to this portion of the line, is located the property of the company secured in connection with establishing reservoir supplying water to Radnor Yards and between the Granny White Pike and the Franklin Pike, fronting on the Granny White Pike, and embracing an area of approximately eight hundred acres of land for drainage area and reservoir site together with an easement for a pipe line connecting said reservoir with Radnor Yards, 10.62.

“Second. A main line of railroad commencing at the junction of the main line of said Lewisburg & Northern Railroad with the Nashville & Decatur Railroad at Brentwood junction in Williamson county, and extending in a general southerly direction, a distance of 78.99 miles through Williamson, Rutherford, Marshall, Giles and Lincoln counties to a connection of said main line of the said Lewisburg &

Northern Railroad with the main line of the Nashville & Decatur Railroad at the Tennessee-Alabama State Line, 79.99. The total mileage of said lines being 89.61 miles, together with right of way along said lines, side tracks, spur tracks, depots, section houses, and other buildings, situated in or upon the right of way, and including all the terminal facilities on said lines all locomotives, engines, tenders, cars, rolling stock and equipment of every kind, also all rights, privileges, immunities, franchises (except the franchise to continue to exist as a corporation), contracts, choses in action, and other property, legal or equitable now belonging or pertaining to line of railroad of the party of the first part and embracing all the property of the party of the first part of every description."

There was a demurrer to the bill filed by both the defendants, and the Chancellor sustained the demurrer of the Lewisburg & Northern Railroad Company, and overruled the demurrer of the Louisville & Nashville Railroad Company. There was no appeal from his action in sustaining the demurrer as to the Lewisburg & Northern, and the Louisville & Nashville has appealed and assigned errors to that part of his decree which overruled the demurrer as to it.

Section 8 of the Revenue Act is as follows:

"That on all transfers of realty there shall be levied and paid in lieu of all other taxes a State tax of one dollar per one thousand dollars on the

consideration which shall in no case be less than the value of the property, which shall be collected by the clerk of the county court; and the county register is hereby required not to record said deed until the clerk certifies that this tax has been paid, but no fee shall be charged for such certificate or registration of the same and such certificate need not be registered, but the county court clerk shall receive as a fee for each deed probated the sum of fifteen cents, to be paid when the transfer tax is paid."

Section 10 is as follows:

"That whenever hereafter any corporation organized under the laws of this or any other State, foreign or domestic, shall, by lease, purchase, consolidation, or merger, acquire the property of any other corporation having a franchise derived from this State, and shall, by virtue of such lease, purchase, consolidation, or merger exercise such franchise, then the corporation on so acquiring such property and exercising such franchise shall pay unto the State of Tennessee a privilege tax of one-tenth of one per cent. on the amount of the outstanding capital stock of the corporation whose property and franchise shall have been so acquired, after such lease, purchase, consolidation, or merger shall have been effected, said privilege tax shall be collected by the Secretary of State and by him paid into the treasury."

It is insisted for the railroad company that the taxes provided in the two sections above copied are

taxes for the same transaction, or for a transaction of the same things, and, the company having paid the tax provided for by section 10, the imposition of the tax provided for by section 8 would be double taxation.

It is a well-settled rule in this State that statutes providing for levying and collecting of taxes are to be construed most strongly against the State in determining whether the tax has been imposed, and the scope of such statutes will not be extended by implication beyond the clear import of the language employed. *Memphis v. Bing*, 94 Tenn. 644, 30 S. W., 745; *English v. Crenshaw*, 120 Tenn., 531, 110 S. W., 210, 17 L. R. A. (N. S.), 753, 127 Am. St. Rep., 1025; *Knox v. Emerson*, 123 Tenn., 409, 131 S. W., 972; *Crenshaw v. Moore*, 124 Tenn., 531, 137 S. W., 924, 34 L. R. A. (N. S.), 1161, Ann. Cas., 1913A, 165. And words employed by the legislature are to be taken in their natural and ordinary sense. *O'Neil v. State*, 115 Tenn., 427, 90 S. W., 627, 3 L. R. A. (N. S.), 762, *Wingfield v. Crosby*, 5 Cold., 241. Statutes *in pari materia* are to be construed together, and the whole statute is to be taken into consideration in arriving at its true meaning. *Lewis v. Mynatt*, 105 Tenn., 508, 58 S. W., 857; *State v. Railroad Co.*, 16 Lea, 136; *State v. Manson*, 105 Tenn., 233, 58 S. W., 319; *Pond v. Trigg*, 5 Heisk., 533; *Graham v. Gunn*, 87 Tenn., 458, 11 S. W., 214; *Heiskell v. Lowe*, 126 Tenn., 475, 153 S. W., 284.

The taxes provided for in sections 8 and 10 above quoted are privilege taxes. *Mabry v. Tarver*, 1 Humph., 94; *French v. Baker*, 4 Sneed, 193; *Clarke v. Montague*, 3 Lea, 277; *State v. Schlier*, 3 Heisk., 281; *Jenkins v. Ewin*, 8 Heisk., 456. The two cases last cited held that the definition of the word "privilege" as given by this court prior to the adoption of the Constitution of 1870 was in effect adopted by that instrument and must be understood as having been used in that sense. It was defined as the exercise of an occupation or business which required a license from some proper authority designated by law and not open to all or any one without such license; but the later cases cited above did not restrict the definition of privilege to the exercise of an occupation or business which required a license from the State, but expanded it to include a single transaction which the legislature had made a privilege.

It is also well settled in this State that statutes creating privileges will be construed so as not to impose double taxation unless such construction is required by the express words or by necessary implication.

In *Bell v. Watson*, 3 Lea, 328, Justice COOPER said that:

"A safe and sound rule of construction of revenue laws is to hold, in the absence of express words plainly disclosing a different intent, that they were not intended to subject the same property to be twice charged for the same tax, nor the same business to be twice taxed for the exercise of the same privilege."

In that case it was held that, where a taxpayer had been required to pay taxes as a livery stable keeper, he could not be required to pay taxes for letting his vehicles for hire. The reason given was that it was necessary to have vehicles and let them for hire in order to operate a livery stable. In the *Druggist Case*, 85 Tenn., 449, 3 S. W., 490, a similar ruling was made. In *Memphis v. Express Co.*, 102 Tenn., 336, 52 S. W. 172, it was likewise held that an express company which had paid its taxes for exercising such a privilege could not be taxed separately upon its teams and wagons. In *Chattanooga Plow Co. v. Hays*, 125 Tenn., 148, 140 S. W., 1068, it was held that a manufacturer of plows who had paid his taxes as such could not be required to pay an additional merchant's tax for selling his manufactured products. In *General Refining & Producing Co. v. Davidson County et al.*, 201 S. W., 737, this term, it was held that a refiner of oil that had paid its taxes as such could not be required to pay a separate tax for storing its manufactured products in tanks, etc. In the last two cases it was shown that the only sales made were sales for the purpose of realizing profits earned as a manufacturer. These cases are given as illustrations of the construction by the court of the acts of the legislature levying privilege taxes in accord with the rule stated in *Bell v. Watson*, *supra*. In neither case was it intended to express an opinion as to the power of the legislature to levy such taxes.

Reverting now to sections 8 and 10: It is said by the State that the deed of the Lewisburg & Northern Company to the Louisville & Nashville Company transfers real estate and falls within the literal terms of section 8; that the State is not concerned in this case with the collection of the tax provided for in section 10. The railroad company insists that the taxes provided for in the two sections are the same. It thus becomes necessary to construe the two sections, and in doing so we are necessarily governed by the foregoing rules.

The tax required by section 8 is a tax upon all transfers of realty. It is a State tax; it is levied upon the consideration paid and promised for the transfer of the realty which in no case can be less than the value of the property; it is collected by the clerk of the county court; the county register is forbidden to record the deed evidencing the transfer until the clerk of the county court certifies that the tax has been paid. The tax is levied upon the transfer of realty, and, in order to prevent evasion of its payment, the transferee is not permitted to register his deed until he pays his tax. While an unregistered deed is valid and binding between the parties, it is void as to creditors and subsequent purchasers without notice and also to purchasers who have their deeds first registered.

Section 10 provides for a tax whenever a corporation organized under the laws of this or any other State, foreign or domestic, acquires the property of

another corporation having franchise derived from this State by lease, purchase, consolidation, or merger, and shall, by virtue of such lease, purchase, consolidation, or merger, exercise the franchise so acquired; the amount of the tax shall be one-tenth of one per cent. of the amount of the outstanding capital stock of the corporation whose property and franchise shall have been so acquired. The tax is to be collected by the Secretary of State.

We think the two taxes are not the same. The first is a tax on the transfer of realty whether the transfer is made by a corporation or an individual; the second is a tax upon the privileges of one corporation acquiring the property of another corporation and exercising the franchise so acquired. The results of the two conveyances are widely different. The transfer contemplated by section 8 transfers the title of realty from one person to another, and for this privilege a tax is levied to be collected by the county court clerk. The tax provided for in section 10 is for the privilege of one corporation absorbing in whole or in part the property and franchises of another. It may be true that as an incident to the consolidation or merger, purchase or lease, of the property of one corporation by another, the title to real estate is transferred, but it does not follow as a consequence of this that the privilege created by section 10 is the same privilege as that created by section 8. Real estate may or may not be transferred

by the act contemplated by section 10 which must necessarily be transferred by the act contemplated by section 8. By section 10 one corporation is permitted to acquire not only the property of another but to acquire and exercise the franchise granted by this State. This privilege is extended to foreign corporations as well as domestic. It is conceivable that a foreign corporation might have powers granted by its charter far beyond those granted by the laws of this State and, by exercising the privileges granted by section 10, could acquire any franchise granted under the laws of this State.

A case is also conceivable where a railroad of large wealth might desire to construct a parallel for its own convenience and at the same time avoid the responsibility of such an undertaking. It could organize another corporation of, say, \$10,000 capital stock, but possessed of all the franchises provided for by the laws of this State, and have this auxiliary corporation to construct the line of railroad which it desired. When the construction work should have been completed, the large corporation could require the small one to transfer the railroad property and franchises to it. It would thus accomplish at least two things if the construction contended for by appellant is the sound one: It would acquire property in this State worth, say, many millions of dollars by paying taxes under section 10 on the limited capital stock of the auxiliary corporation, and it would

have had a limited liability during the period of construction work.

But neither section 8 nor section 10 is limited to railroad corporations. Section 8 provides for a tax on "all transfers of realty," and section 10 covers transactions between any two corporations. They must both be construed with this in view. If the construction insisted upon were the correct one, a mining corporation which owns mining property of great value, but which has a capital stock of nominal value, could be consolidated with another mining corporation by the payment of the consolidation tax only, notwithstanding that its chief asset is real estate. Section 2330, Thompson's Shannon's Code. The same would be true of real estate companies which may be chartered under the laws of this State and whose assets are chiefly realty. Thompson's Shannon's Code, section 2438.

We have thus seen that the privileges provided for in sections 8 and 10 are not the same. The fact that there may be an indirect duplication is not an objection. *Street Railway Co. v. Morrow*, 3 Pickle (87 Tenn.), 406, 11 S. W., 348; 1 Cooley on Taxation, p. 387; Judson on Taxation, section 426. The similarity of taxation is incidental merely. The purposes sought by the legislature are different, and intended to meet different transactions. *Knoxville v. Sanford*, 13 Lea, 545; *Cigar Co. v. Cooper*, 15 Pickle (99 Tenn.), 472, 42 S. W., 687.

It is next insisted that it was not intended by the legislature that section 8 should apply to the transfer and sale of the entire properties of a railroad company, but that it was intended to and did apply only to the transfer of land or interest in land in the ordinary acceptation of the term. This contention is based upon the idea that a railroad is a highway, and as such is an entirety, and all of the properties which it owns are incidental merely to its functions as a highway. This is true as a general proposition, but it cannot be denied that the legislature has the power to tax the transfer of its real estate separate from its use in the discharge of its functions as a highway, that the legislature has levied a tax upon "all transfers of realty," and that the language employed would include transfers of realty belonging to a railroad company would seem to be too clear to admit of argument. There is nothing left for us to do but to give effect to the words employed by the legislature.

It is next insisted that the legislature did not intend or undertake to consider property as one class for the levying of *ad valorem* taxes and another class of property for levying privilege taxes. But, as stated above, the legislature beyond doubt has power to so consider it, and we think clearly that it has done so. The fact that the legislature had divided the property of railroads into localized and distributable properties for the purpose of levying *ad valorem* taxes would not militate in any degree against its intention to levy

a tax upon "all transfers of realty." The word "realty" means land as employed in the laws of this State, and the Code enacts, at section 51, that the word "land" signifies or includes "lands, tenements and hereditaments, and all rights thereto and interests therein." These terms expressly include every species of realty which a railroad company may own.

The bill has not alleged in round terms what the value of the property transferred by the deed of the Lewisburg & Northern to the Louisville & Nashville is. It does state that a mortgage of about \$15,000,000 has been placed upon the property and that it is worth a great deal more than that sum. A point is made in the demurrer that the bill does not allege the value of the property. We do not think the point is well taken, as its true value may be ascertained by proof. The value stated in the deed is only *prima-facie* evidence of the true value and, of course, any value stated in the bill is subject to be controverted by the proof. *Hitt v. Coal Co.*, 201 S. W.,—.

We should add that only one tax will be collected. The clerk of the county court of the county in which the deed is first offered for registration will collect the transfer tax on the true value of the realty conveyed and so certify upon the deed. This payment of one tax in one county is all that the defendant is liable for, and the certificate attached to the deed by the county court clerk will authorize the registration of the deed in every county in the State in which it is

desired to register it. This is a State tax and the counties are not concerned with it. One payment will satisfy the demands of the State, and that payment should be made to the clerk of the county court of the county in which the deed is first registered.

THE STATE *v.* VERBAL BOCKMAN.

(Nashville. December Term, 1917.)

1. **INFANTS. Juvenile delinquents. Appeal from judgment. Jurisdiction of supreme court. Statute.**

Under Acts 1911, chapter 58, providing for juvenile courts, and outlining their jurisdiction, containing no provision for appeal from the judgments of the juvenile courts created, the supreme court is without jurisdiction of an appeal in the nature of a writ of error prosecuted by one adjudged by the juvenile court of a county to be a delinquent child. (*Post*, p. 224.)

Acts cited and construed: Acts 1911, ch. 58.

Case cited and approved: *Childress v. State*, 133 Tenn., 121.

2. **APPEAL AND ERROR. Constitutional or statutory origin of remedy by appeal.**

The remedy by appeal, unknown to the common law, is wholly of constitutional or statutory origin, and if no right of appeal is given by statute, by express words or necessary implication, no appeal will lie. (*Post*, pp. 224, 225.)

Cases cited and approved: *Wade v. Murry*, 34 Tenn., 50; *Ex parte Knight*, 71 Tenn., 401; *Tomlinson v. Board of Equalization*, 88 Tenn., 1; *Chattanooga v. Keith*, 115 Tenn., 588; *Staples v. Brown*, 113 Tenn., 641.

3. **CERTIORARI. Supersedeas. Circuit courts. Supervisory jurisdiction over inferior tribunals including juvenile court.**

The general appellate and revisory jurisdiction of the circuit court over all inferior tribunals created by the legislature and vested with judicial powers, as the juvenile court of a county, may be invoked by *certiorari* and *supersedeas* where no appeal or writ of error lies for the correction of the judgments of such inferior tribunals, and such jurisdiction may be exercised, not only when the inferior tribunals have exceeded their powers or

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are acting irregularly, but for errors of law and fact. (*Post*, pp. 225, 427.)

Cases cited and approved: *Durham v. United States*, 5 Tenn., 54; *Bob v. State*, 10 Tenn., 173; *Hawkins v. Kercheval*, 78 Tenn., 540; *Hayden v. Memphis*, 100 Tenn., 583.

4. **COURTS.** Jurisdiction of supreme court and court of civil appeals. Supervision of action of juvenile courts. Statutes. "Court of law." "Court of equity." "Common-law court." "Circuit court."

Under Thompson's Shannon's Code, section 6321a, vesting only appellate jurisdiction in the court of civil appeals, extending to all cases brought up from courts of equity or chancery courts, with certain exceptions, and to all civil cases tried in the circuit and common-law courts of the State, and section 6329, providing that the supreme court has no original jurisdiction, but appeals and writs of error or other proceedings for the correction of errors lie from the inferior courts of law and equity within each division to the supreme court held for that division, neither the supreme court nor the court of civil appeals can have immediate supervision of the action of a juvenile court, which is not a "court of law," a "court of equity," a common-law court," or a "circuit court." (*Post*, pp. 427, 428.)

Code cited and construed: Secs. 6321a, 6329 (T.S.).

5. **COURTS.** Judgment of juvenile delinquency. Review by certiorari. Jurisdiction of circuit court. Statute.

Under Thompson's Shannon's Code, section 6063, 6072, providing that jurisdiction of all matters not otherwise provided for is intrusted to the circuit court, one adjudged to be a juvenile delinquent by the juvenile court of a county may obtain review of his case by *certiorari* in the circuit court of that county. (*Post*, p. 428.)

Code cited and construed: Secs. 6063, 6072 (T.S.).

FROM PUTNAM.

Appeal from the Circuit Court of Putnam County
J. M. GARDENHIRE, Judge.

E. D. WHITE, for appellant.

WM. H. SWIGGART, JR., Assistant Attorney-General,
for the State.

MR. JUSTICE GREEN delivered the opinion of the Court.

This is an appeal in the nature of a writ of error from proceedings had in the juvenile court of Overton county, wherein Verbal Bockman was adjudged to be a delinquent child. He made a motion for a new trial and the same being overruled, he prosecuted an appeal in the nature of a writ of error directly to this court.

The proceedings against Bockman were had under chapter 58 of the Acts of 1911, providing for juvenile courts and outlining their jurisdiction, etc. This act has heretofore been held constitutional in *Childress v. State*, 133 Tenn., 121, 179 S. W., 643.

A re-examination of the statute discloses that no provision is therein made for an appeal from the judgments of the juvenile courts thereby created. This being so, we are without jurisdiction of the controversy in its present *status*.

The remedy by appeal was unknown to the common law and is altogether of constitutional or statutory origin. If no right of appeal is given by statute in express words or by necessary implication, no appeal will lie. *Wade v. Murry*, 34 Tenn. (2 Sneed), 50; *Ex parte Knight*, 71 Tenn. (3 Lea), 401; *Tomlin-*

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son v. Board of Equalization, 88 Tenn., 1, 12 S. W., 414, 6 L. R. A., 207; *Chattanooga v. Keith*, 115 Tenn., 588, 94 S. W., 62, 5 Ann. Cas., 859.

The authority of these cases, in so far as they relate to proceedings by appeal, writ of error, or appeal in the nature of writ of error, is in no wise weakened by *Staples v. Brown*, 113 Tenn., 641, 85 S. W., 254.

Staples v. Brown reviews all of the earlier cases and holds that the circuit court has a general appellate and revisory jurisdiction over all inferior tribunals created by the legislature and vested with judicial powers. This jurisdiction of the circuit court may be invoked by *certiorari* and *supersedeas* where no appeal or writ of error lies for the correction of the judgments of such inferior tribunals. Such jurisdiction may be exercised not only when the inferior tribunals have exceeded their powers or are acting irregularly, but for errors of fact and law committed by them, to the end that the case may be tried again upon its merits.

It has been urged that the juvenile court is not a tribunal inferior to the circuit court and that the proceedings of the juvenile court must be reviewed in this court or in the court of civil appeals on *certiorari*. A brief has been filed with the court in which the importance of the juvenile court is stressed, and it is contended that its work should be supervised only by the appellant courts of the State.

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Without in any way disparaging the work of the juvenile court or detracting from its dignity, we are forced to the conclusion that in the sense of our statutes it is a court or tribunal inferior to the circuit court. The jurisdiction of the juvenile court is limited, while on the contrary the jurisdiction of the circuit court is general, and wider than that of any other court known to our judicial system.

The circuit court has been held a superior court to various tribunals of the highest dignity and importance and the action of such tribunals has been held to be reviewable on *certiorari* by the circuit court.

In *Durham v. United States*, 4 Hayw., 54, the proceedings of a court-martial were reviewed in the circuit court.

In *Bob v. State*, 10 Tenn. (2 Yerg.), 173, the proceedings of a special court, composed of three justices and a jury, created for the purpose of trying slaves charged with crime, was reviewed in the circuit court.

In *Hawkins v. Kercheval*, 78 Tenn. (10 Lea), 540, action of the police commissioners of Nashville was reviewed in the circuit court.

In *Hayden v. Memphis*, 100 Tenn., 583, 47 S. W., 182, the circuit court reviewed proceedings of the city council of Memphis.

Illustrations might be multiplied. In fact, it is a matter of frequent occurrence for the circuit court to review by *certiorari* the proceedings of all com-

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missions and tribunals created by the State exercising judicial functions, regardless of the gravity and importance of the matters intrusted to the jurisdiction of such commissions or tribunals. See instances mentioned in *Staples v. Brown*, supra.

Neither this court nor the court of civil appeals can have immediate supervision of the action of the juvenile courts.

The statute defining the jurisdiction of this court is as follows:

"The court has no original jurisdiction; but appeals and writs of error or other proceedings for the correction of errors lie from the inferior courts of law and equity within each division to the supreme court held for that division." Thompson's Shannon's Code, section 6329.

The juvenile court is not a court of law nor a court of equity, and it is from such courts alone that proceedings for the correction of errors can be taken directly to the supreme court in the absence of special statutory authority.

The jurisdiction of the court of civil appeals is appellate only and extends to all cases brought up from "courts of equity or chancery courts," with certain exceptions, "and to all civil cases tried in the circuit and common-law courts of the State." Thompson's Shannon's Code, section 6321a.

The juvenile court is manifestly not a court of equity or chancery court, nor is it a circuit or common-law court, and it accordingly follows that the court of

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civil appeals can have no immediate supervision of its proceedings.

The Code provides that jurisdiction of all matters not otherwise provided for is intrusted to the circuit court. Thompson's Shannon's Code, sections 6063, 6072. Such being the law, this appeal in error must be dismissed.

Bockman may obtain a review of his case by *certiorari* in the circuit court of Overton county.

The report of the case of *Childress v. State*, supra, does not indicate whether or not it came directly to this court. If it was a direct appeal in error, we inadvertently took jurisdiction—the question of jurisdiction not being raised.

Counsel for Bockman was doubtless misled by the apparent assumption of jurisdiction on the part of this court in *Childress v. State*, and so undertook to bring the case here. Having been so misled, the circuit judge will no doubt excuse the delay thereby occasioned in presenting a petition for *certiorari* in Bockman's Case.

SOUTHERN PUB. ASS'N v. CLEMENTS PAPER CO.

(Nashville. December Term, 1917.)

1. **SALES. Contracts. Validity. Mutuality. Certainty.**

A letter from a corporation to another, stating, "You may enter our contract for a minimum quantity of one hundred twenty tons, maximum quantity of one hundred forty-five tons" of paper specifying the prices and terms signed by the corporation and accepted by the other, is not void for uncertainty or lack of mutuality. (*Post*, p. 432.)

Cases cited and approved: *Cherry v. Smith*, 22 Tenn., 19; *Walker Mfg. Co. v. Swift & Co.*, 200 Fed., 529.

2. **SALES. Contracts. Construction.**

In construing a contract the previous dealings of the parties and the circumstances in which the contract was made and the situation of the parties may be considered. (*Post*, p. 432.)

3. **SALES. Contracts. Construction. Rights of parties.**

Under contract for paper specifying a minimum and a maximum quantity if the option was with the seller, it was bound to deliver the minimum, and might deliver any additional quantity up to the maximum; but if it lay with the purchaser, the purchaser was bound to accept the minimum, and could require the maximum. (*Post*, pp. 432-434.)

Case cited and distinguished: *Wheeler v. New Brunswick, etc., R. Co.*, 115 U. S., 29.

4. **SALES. Contracts. Construction. Rights of parties.**

Where a publishing company authorized a paper company to enter its order for a minimum of one hundred and twenty tons of paper and maximum of one hundred and forty-five tons, the offer being the purchaser's, the purchaser had the option, and could require the seller to furnish the maximum. (*Post*, pp. 434, 436.)

Southern Pub. Ass'n v. Clements Paper Co.

Cases cited and approved: Highland Chemical, etc., Co. v. Matthews, 76 N. Y., 145; B. P. Ducas Co. v. Bayer Co., 163 N. Y. Sup., 32; Farquhar Co. v. New River Mineral Co., 87 App. Div., 329; Small v. Quincy, 4 Me., 497; Disborough v. Neilson, 3 Johns. Cas. (N. Y.), 81; Nixon v. Nixon, 21 Ohio St., 118; Standard Sugar Refinery v. Castano (C. C.), 43 Fed., 279; Ill. Glass Co. v. Three States Lumber Co., 90 Ill. App., 599.

5. SALES. Contracts. Actions. Premature suit.

Under contract authorizing delivery of varying quantity of paper, where the parties disputed the construction, and negotiations were going on, but there had been no absolute and unequivocal refusal to deliver the quantity which the purchaser desired, and the term of the contract had not expired, a suit was premature. (*Post*, pp. 436-439.)

Cases cited and approved: Wheeler v. New Brunswick & C. R. Co., 115 U. S., 29; Dingley v. Oler, 117 U. S., 501; Johnstone v. Milling, L. R., 16 Q. B. Div., 460; Brady v. Oliver, 125 Tenn., 595.

FROM DAVIDSON

Appeal from the Chancery Court of Davidson County.—JAS. B. NEWMAN, Chancellor.

PITTS & McCONNICO, for appellant.

F. P. BOND, for appellee.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

This case was disposed of in the court below on bill of complaint and demurrer; the chancellor overruled the demurrer, and defendant paper company

has appealed. The grounds of demurrer are sufficiently indicated in the discussion which follows:

The complainant is a publishing concern, requiring large amounts of paper for use in its business. Defendant is engaged in the buying and selling of paper. Both concerns are located in the city of Nashville.

The publishing association submitted to the defendant an offer in letter form, which on acceptance constituted the contract, as follows:

“Nashville, Tennessee, August 5, 1915.

“Clements Paper Co., Nashville, Tenn.—Gentlemen: You may enter our contract for a minimum quantity of one hundred twenty tons, maximum quantity of one hundred forty-five tons, M. F., Eggshell, and S. and S. C. book paper, stock to be in every way equal to samples bearing your O. K., this paper to cost us \$3.70 on Machine Finish and Eggshell, and \$3.95 on the S. and S. C., paper to be packed soft fold and all prices to be F. O. B. Nashville. . . .

“Terms: Three per cent. for cash when paid by the tenth of the month following shipment, or ninety days net from date of shipment.

“This contract takes effect January 1, 1916, and terminates on December 31, 1916.

“SOUTHERN PUBLISHING ASSOCIATION,

“R. L. PIERCE, Manager.

“Accepted by CLEMENTS PAPER Co.,

“R. M. CLEMENTS, Pres.”

We are of opinion that, on reason and by the decided weight of modern authority, such a contract is not void either for uncertainty or for lack of mutuality. *Cherry v. Smith*, 3 Humph. (22 Tenn.), 19, 39 Am. Dec., 150; *Walker Mfg. Co. v. Swift & Co.*, 200 Fed., 529, 119 C. C. A., 27, 43 L. R. A. (N. S.), 730, and note.

The main controversy is as to which of the contracting parties had the option in respect of the margin of twenty-five tons between the minimum and maximum limits specified, of one hundred and twenty and one hundred and forty-five tons. The rapid and pronounced rise in the price of print paper due to conditions incident to the Great War manifestly gave rise to the contention just stated.

The bill states the course of previous dealings, the circumstances in which the contract was made, and the situation of the parties as aids in determining the meaning of the contract. These are matters proper to be looked to by the court in arriving at the intention of the parties to the contract.

The option, being a limited one, in that either a minimum or maximum quantity is specified, the option might be with the seller or the purchaser as the language used, read in the light of the surrounding circumstances, may indicate. If the option was with the seller, it was bound to deliver at least the minimum quantity of paper, and might deliver any additional quantity it might choose up to the maximum limit. If it lay with the purchaser, it was

compelled to accept the minimum, and might require deliveries up to the maximum quantity limit. 2 Mechem on Sales, 1170, 1171.

Looking for aid, in construction respecting the option, to the situation of the parties: Which of the two in ordinary course would stipulate for its protection by way of such a margin of safety? As between a wholesale dealer and a purchaser who is to consume, so to speak, the commodity so sold, more frequently it is the case that such a hedge is incorporated for the benefit of the latter. A wholesaler, generally speaking, is bent on swelling the bulk of his sales, and has not the incentive or intent to stipulate for a minimum and maximum limit. He has other methods of hedging, such as the placing of covering orders in the markets; whereas, a purchaser who is not himself a seller of the commodity, as such, may stand to carry the overplus into another season or year.

The primary consideration in determining in whom is lodged the option seems to us to be: For whose protection was the provision made?

An interesting case is that of *Wheeler v. New Brunswick, etc., R. Co.*, 115 U. S., 29, 5 Sup. Ct., 1061, 1160, 29 L. Ed., 341. The railway company was taking up worn rails which it sold to Wheeler under a memorandum agreement in the form of a letter addressed by the purchaser to the railway company, and an acceptance of the offer substantially as follows:

"We have this day bought of you . . . two to six hundred tons, for delivery in New York or New Haven, between August 1st and October 1st." Signed by the purchaser.

"We hereby accept your order of this date and will deliver rails at places on terms named." Signed by the railway company.

The ruling of the court was that the option was the seller's. The railway company had a limited potential supply of old rails, and was uncertain as to what the tonnage would be. "It knew that by August it would have a thousand tons. It did not know how much more they would have by October 1st. It intended to secure the sale of what it might have, between two hundred and six hundred tons."

One of the *indicia* (subordinate to this primary consideration just noted) may be that the offer comes (1) from the purchaser, and the language used being his may relate to his needs, which are uncertain within certain limits of quantity; or (2) from the seller who may be stipulating against a contingency that may have bearing upon his ability to produce or furnish.

In the instant case the offer was the purchaser's, and we are of opinion that the incorporation of the minimum and maximum provision was meant to be its factor of safety. The letter of August 5, 1915, should be read as if it stated, "having looked into the matter of our requirements as publishers for the year 1916, enter our contract," etc. The ultimate

option, therefore, was with the purchaser; it being its needs that were gauged. *Highland Chemical, etc., Co. v. Matthews*, 76 N. Y., 145; *B. P. Ducas Co. v. Bayer Co.* (Sup.), 163 N. Y. Supp., 32, 41; *Farquhar Co. v. New River Mineral Co.*, 87 App. Div., 329, 84 N. Y. Supp., 802.

The defendant contends that another rule is applicable, and should, when taken into consideration, deflect the decision in its favor. It is argued that the option was with the seller, it being the first actor, as deliverer of the paper.

The following quotation from 2 Mechem on Sales, 1171, is relied upon:

"In the absence of an express agreement, it must be determined from the nature of the case, and in this respect the rule laid down by the authorities that when, from the nature of an agreement, an election is to be made, the party who is by the agreement to do the first act, which from its nature cannot be done till the election is determined, has authority to make the choice in order that he may be able to do that first act, and, when once he has done that act, the election has been irrevocably determined, but till then he may change his mind."

And the following cases are cited on defendant's brief: *Small v. Quincy*, 4 Me. (4 Greenl.), 497; *Disborough v. Neilson*, 3 Johns. Cas. (N. Y.), 81; *Nixon v. Nixon*, 21 Ohio St., 118; *Standard Sugar Refinery v. Castano* (C. C.), 43 Fed., 279; *Ill. Glass Co. v. Three States Lumber Co.*, 90 Ill. App., 599.

In our opinion the test of first actor should be treated as only one among the *indicia*. It is more artificial or less substantial than the others, and is to be applied only when the others may not be brought into play.

The case of *Small v. Quincy*, *supra*, perhaps best illustrates its proper application. There the transaction was between two dealers in the same commodity living in the same city. The memorandum contract was in duplicate. One copy, signed by the purchaser, recited, "We agree to receive," and the other, by the seller, reciting, "We agree to sell and deliver." The case, therefore, was one where there was no order proceeding from the one party to the other, and where there appeared no difference in the attitude of the parties, to raise a presumption of a stipulation for the requirements of the one or the inability of the other to deliver. The case was one solvable by the application of the test last referred to.

But if this were a case for the application of that test, it seems that the first actor would be the publishing association, since it must have made specification of qualities and amounts of paper before deliveries could be made.

The defendant paper company was bound to furnish the maximum quantity, on complainant's clear election to that effect.

Another question remains for consideration—defendant's contention that the suit is premature, having been brought, it is urged, prior to the contract's termi-

nation date, December 31, 1916, without anterior breach by defendant.

The correspondence between the parties was exhibited with and a part of the bill of complaint. In August defendant wrote a letter which contained a statement that a delivery by it of the minimum quantity would fulfill its obligation, and that it had elected to furnish one hundred and twenty tons. In reply the complainant stated its present contention in respect to the contract, and gave specifications for a quantity of paper beyond the minimum limit. For some time the two parties to the contract conducted a correspondence in relation to who had the option; and, not being able to reach an understanding, further negotiation touching that matter was turned over to the attorneys of the respective parties, and truly able fencers for advantage these attorneys proved themselves. The discussion was complicated by reason of the injection of a declaration by complainant's attorney of its purpose to withhold payment (not then due) for \$1,600 of paper, which had been delivered previously, as a set-off against damages, should defendant deliver less than the maximum quantity of paper. In complainant's letter of November 14, 1916, was contained this statement:

"If you see proper to make delivery of this stock some time during the remainder of the year, that will be satisfactory, and in the event you do so, we may desire to change some of the specifications to a dif-

ferent size, which will be just as convenient for you to deliver as the sizes already specified."

Two days later complainant in a letter insisted upon an assurance that defendant would make shipments according to complainant's construction of the contract.

In a letter written by defendant (November 20th), but not received when suit was brought (November 22d), and incorporated in the bill of complaint by consent, it pressed for an understanding as to the payment of the \$1,600, tendered an additional shipment, which would have made an aggregate above the minimum, but below the maximum, if payment of the \$1,600 would be agreed to be paid in contract time, and stated:

"We have never had any idea of doing less than complying with our obligations under the contract, and have been discussing with you and your attorney said contract, with a view of ascertaining what was its proper construction."

However, its own insistence as to the proper construction on the point of the option was not abandoned.

As we construe the correspondence there was no absolute and unequivocal refusal on defendant's part to deliver the maximum quantity; and, as seen, delivery during the remainder of the year had been declared by complainant to be acceptable.

In our opinion there was no matured cause of action when the suit was brought, the words and conduct relied upon as a breach of the contract by anticipation,

not amounting to a total refusal to perform it, or a fixed purpose not to do so that would operate as a breach by renunciation, under the principles announced in *Wheeler v. New Brunswick & C. R. Co.*, 115 U. S., 29, 5 Sup. Ct., 1061, 1160, 29 L. Ed., 341; *Dingley v. Oler*, 117 U. S., 501, 6 Sup. Ct., 850, 29 L. Ed., 987; *Johnstone v. Milling*, L. R., 16 Q. B. Div., 460; 3 Page on Contracts, section 1439. See, also, *Brady v. Oliver*, 125 Tenn., 595, 614, 147 S. W., 1135, 41 L. R. A. (N. S.), 60, Ann. Cas., 1913C, 381.

The grounds of demurrer relying upon prematurity of suit are sustained. Decree accordingly.

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within thirty days prior to the service of the garnishment, more than \$36; and during the last week of June, 1917, ending on the day of the service of the garnishment, he earned the sum of \$13.45, which the garnishee, the National Casket Company, answered was due and owing to him as wages at the time of the service of the garnishment. The trial court, on these facts, rendered judgment against the garnishee for \$13.45, from which an appeal was prayed.

The appeal was prosecuted to this court rather than to the court of civil appeals on the ground that certain constitutional questions were involved.

The decision of the question presented turns on the construction of chapter 376 of the Acts of 1905.

This act was passed, as stated in the caption, "to amend an act entitled 'An act to amend the exemption laws, and to comprise them all in one act,' it being chapter 71," etc., of the act of January 31, 1871. We reproduce, in a later part of this opinion, the first section of the act of 1871 (Acts 1870-71, chapter 71), which was the part amended. It is sufficient to state now merely that it gave an exemption of \$30 of the wages of "mechanics or other laboring men." Chapter 376 of the Acts of 1905, in the body, goes no further than to amend section 1 of the act of 1871. We need to reproduce here only section 2 of the act of 1905, which thus restates section 1 of the act of 1871, as amended:

"Sec. 2. That there shall be exempt from execution, attachment, and garnishment ninety (90%) per

centum of the salary, income, or wages of every person earning a salary or wages, or drawing an income of forty (\$40) dollars or less per month, and who is eighteen years of age or upward or is the head of a family, and is a resident of the State of Tennessee: Provided, that the lien created by the service of garnishment, execution, or attachment shall only affect ten (10%) per centum of such salary, wages, or income earned at the time of service of process. And there shall be exempt from execution, attachment, or garnishment thirty-six (\$36) dollars of the salary, wages, or income of every person earning a salary, wages, or income in excess of forty (\$40) dollars per month who is eighteen years of age or upward or who is the head of a family, and who is a resident of the State of Tennessee: Provided, that the debtor shall only pay the costs of one garnishment on each debt on which suit is brought."

The first point to be determined is the meaning of the expression "per month." Obviously it is not merely equivalent to employment "by the month," since the exemption is not only in favor of wage-earners, but also in favor of any one who has an "income" from any source, if such person be eighteen years old, or upwards, or the head of a family, and a resident of the State. Clearly this income may be derived from more than one source. The purpose of the statute was to aggregate this income during any given (Code, section 52) calender

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month, and to put in one class those who receive "forty dollars or less" per month, or during any month, and into another class those who receive "over forty dollars." An earning or income of \$40 during the month is the test figure. Those who earn or receive more than that sum are not protected at all above that sum. As to that sum they have a protection or exemption of all over ten per cent.—that is, \$36. Those who earn or receive just \$40 or less have the same protection—all over ten per cent. For example, one who earns during the month only \$25 is subject to garnishment process for only two dollars and fifty cents. If the sum he has earned has suffered one garnishment, to the extent of the two dollars and fifty cents, there can be no other on that month's earnings.

It is essential to the purpose intended to be effected by the act that the test sum shall embrace what the debtor may have collected from his employer, or received from his "income" from any other source, during the month, as well as the sum that may belong to him, earned, or collectible from any source, but not actually received by him at the time the garnishment is served. The true measure is the income during the month. The garnishment will seize ten per cent. of the whole, if so much remains earned and outstanding at the time it is served, or whatever part of the ten per cent. remains earned and unpaid to the debtor at that time. If the debtor earns wages, or has a monthly income of "over forty dollars" per month, only ten per cent. of the \$40 is

garnishable. If he has collected from his employer, or from the source of his income, all except ten per cent. of \$40 of his monthly wage, or income, that per cent. or any aliquot part of it is subject to seizure. And all of the excess of earning or income of such persons above \$40 is subject; that is, his exemption is only ninety per cent. of \$40—\$36.

There seems to us, under the foregoing construction, no unfair discrimination between those who earn "over forty dollars," and those who earn "forty dollars or less." Both are subject to the same rule. Nor is there any impropriety in the use of "forty dollars" as a test figure. This was a matter wholly under the control of the legislature. There is no constitutional objection in the way. The classification into those earning "over forty dollars." and those earning "forty dollars or less," is reasonable. The legislature could have exempted all incomes, but obviously that would have been very bad policy. Some figure had to be adopted as a basis. Why not \$40? No doubt the knowledge of the members of the legislature, as men of practical affairs, indicated to them that the figure adopted would apply to most of the small earners who needed, not only protection from "grasping creditors," but also a line of credit that would enable them, in time of stress, to obtain supplies without ready money.

It is urged as a hardship on those earning "forty dollars or less" that their employers are subject to garnishment at any time for the ten per cent., thus

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imperiling the workers' chances for work, since employers of labor will not long permit themselves to be subjected to such repeated annoyances, and will make their escape by discharging the unfortunate or improvident employee; while in the case of those who earn "over forty dollars" a round exemption of \$36 is provided, and that until he has received as much as \$36 his wages cannot be seized. However, as we have stated, a month is the test period. So until a month's wage or income has accumulated (even if it be partly collected, and partly still in the hands of the employer, though earned), there can be no garnishment against the income of "forty dollars or less." The legislature had in mind the earning of a monthly sum. It was impossible to state in advance the varying sums that might be earned per month by workers obtaining less than \$40. So a percentage was fixed on the monthly wage, or income, whatever it might be. But that percentage could not be applied until the monthly income could be ascertained. We do not think it was intended by the legislature that at any time during the running of the month any small sum in the hands of an employer owing to an employee should be subject to garnishment; that a creditor should be permitted to stand by and seize earnings day by day, or week by week. Such harassing litigation would be oppressive and intolerable. It is true that vexatious litigation of this character is to some extent prevented by the provision that the debtor shall be subjected to the

costs of only one garnishment on each debt sued on. This might prevent any given creditor from garnisheeing overmuch, but would not apply to several creditors, each of whom might run his own garnishment, thus making the embarrassment of the poor debtor even greater. It is no doubt true that this construction will make the chance of creditors realizing on very small debts, through garnishment proceedings, somewhat precarious, and may result, in some instances, in a practical defeat of such efforts. But it is only by this construction that all parts of the statute can be harmonized, and a seemingly unfair discrimination among debtors avoided. We are convinced that we have reached the true meaning of the legislature.

The propriety of this conclusion may be further illustrated, and even fortified, by a brief review of our statutes and decisions on this vexed subject.

Acts 1871, chapter 71, section 1:

“There shall be exempt from execution, attachment or garnishment, thirty dollars of the wages of mechanics or other laboring men: Provided, that the lien created by services of garnishment, shall only affect that portion of a laborer’s wages that may be due at the time service is made, and not any future wages.”

Construing this act, the court held in *Waite v. Franciola*, 90 Tenn., 191, 16 S. W., 116, that the exemption of \$30 protected wages within that amount due at the date of service of the particular garnishment,

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although upon other prior garnishments in the same case there had been allowed the debtor other exemptions of wages within the month aggregating more than \$30. It was held that the exemption should be carved out of wages due at the date of the service of the particular garnishment, not out of wages due for one month or any other particular period. Said the court:

"The meaning is plain. If the sum due at date of service of garnishment is less than \$30, then it is exempt, regardless of any exemptions theretofore obtained by the debtor. There is no authority for the construction limiting the exemption to \$30 out of the wages of one month or any other particular time."

In *Van Vleet v. Stratton*, 91 Tenn., 473, 19 S. W., 428, it was held under our general garnishment laws that the employee could prevent a garnishment by collecting his wages in advance. The employee was working by the month, and the employer had paid his full wages in advance at the beginning of each month.

Acts 1895, chapter 192: "Hereafter no attachment or garnishment shall be issued to attach or garnishee the future salary or wages of an employee, or other person, but any such attachment or garnishment shall only be for salary or wages due at the date of the service of the garnishment or attachment."

This, evidently, was passed to meet a proposition contained in *Van Vleet v. Stratton*, supra, to the effect that if at the time of the service of the garnishment a debt be in existence, due or undue, "the same may be seized and impounded." This statute should

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also be considered in connection with the general rule sanctioned by our statutes, and expounded by Mr. Justice WILKES, in *Lockett v. Beaver*, 97 Tenn., 396, 37 S. W., 140, to the effect that, except under the exemption statutes the garnishment holds not only what may be due the debtor at the time the garnishment shall be served, but also anything that may be owing whether due or undue when the garnishee makes his answer. Obviously the purpose of the statute just quoted was to remove "the salary or wages of an employee of other person" from the operation of the general rule.

The court construed and applied this statute in *Weaver v. Hill*, 97 Tenn., 402, 37 S. W., 142. The facts in that case were: The garnishment was served on the railway company, Weaver's employer, on February 20, 1896, returnable March 5, 1896. The company answered that at the time the garnishment was served it was indebted to Weaver for wages as a laborer in the sum of \$42.05, and that Weaver claimed an exemption of \$30 of this amount as laborers' wages. A custom was proven to the effect that wages were payable on the 20th of each month for the previous month, and that under this custom the wages were treated as due at that time; that when the garnishment was served the company owed Weaver for January, 1896, \$28, and for February \$14.65; that the amount owing for January was then due and payable, but the amount earned and owing for February, 1896, was not due and payable until

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the 20th of March, 1896. Thus it appears the whole amount earned and owing was \$42.65, but of this, \$14.65 was not due when the garnishment was served. The circuit judge allowed Weaver \$30 for his exemption, but subjected the remaining \$12.65. This was held erroneous by this court on the ground that so much of the debt as was undue when the garnishment was served was unaffected by it, by the very terms of the statute.

Acts 1899, chapter 1: This statute amended the act of 1895 by striking out the word "due," and substituting for it the word "earned."

Acts 1899, chapter 38:

"That \$30.00 shall be exempt from execution, seizure, or attachment of the wages of any employee in the State."

Next comes our last act on the subject, Acts 1905, chapter 376. This we have reproduced on an earlier page of this opinion as the act which controls the controversy before us.

The legislature had before it the prior acts, and we have no doubt the decisions of this court as well. Its purpose was to overcome the difficulties and incongruities that had become manifest. It was perceived that the round exemption of \$30 could not be retained in accord with a sound policy, because that would deprive a large number of small wage-earners of a needed credit, in times of want, since dealers would advance them nothing where no prospect of legal compulsion appeared. So the plan

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of classification already commented on, with the ten per cent. of liability for debts, and ninety per cent. exemption, was adopted. But a scale was needed to measure the amount on which the percentage could be calculated. That scale was the month—the monthly earning or income. That was a new thought in the development of these statutes. It had been decided by this court, in an opinion cited *supra*, in construing chapter 71 of the Acts of 1871, that the fixing of a monthly period was incompatible with the gross exemption of \$30; that the statute just referred to furnished no authority for such a measure. The decision was undoubtedly right, as a construction of that particular statute. But now the legislature, having all of the prior acts before it, and all of the decisions of the court construing these acts, and being engaged in the work of overhauling the whole matter and providing a better system, passed the act of 1905, and made a part of it the monthly earning as the principle on which to base the whole scheme of wage and income exemption. It was further improved by adding the monthly income test figure, \$40, on one side of which ranged the class of earners of more than \$40 monthly, on the other earners of \$40 or less monthly. There was preserved the principle established by chapter 1 of the Acts of 1899 that the debt, to be the subject of garnishment, need not be due at the date of the service of the process, but must be earned. There are other improvements that may be noted. Chapter 71 of the Acts of 1871 in its wage feature applied only to “mechanics or other

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laboring men." Chapter 192 of the Acts of 1895 advanced a step further and protected the "salary or wages of an employee or other person." Chapter 38 of the Acts of 1899 took a step backwards and confined the exemption to "the wages of any employee in the State." The act of 1905 protects "every person" who is a resident of the State of the age specified, or is head of a family, and who earns the monthly salary, or wages, or has the monthly income, specified therein; that is to every person of the description mentioned who has an income of any kind, since any such person must have an income of "over forty dollars," or of "forty dollars or less." Of course it covers those who work by the piece as well as those who work for wages in the usual way. *Adcock v. Smith*, 97 Tenn., 373-377, 37 S. W., 91, 56 Am. St. Rep., 810.

So, it is perceived this statute was intended to cover the whole subject of salary, wage, or income exemption, and takes the place of all others. *Malone v. Williams*, 118 Tenn., 390, 445, 103 S. W., 798, 121 Am. St. Rep., 1002; *State ex rel. v. Vanderbilt University*, 129 Tenn., 326, 164 S. W., 1151.

Having settled the foregoing principles, it is manifest that the judgment of the trial court must be affirmed. The plaintiff in error belonged to the class composed of those earning over \$40 per month; so it is clear he was entitled to an exemption of only \$36. This was allowed him, and judgment rendered for the balance, which was correct. The judgment should therefore be affirmed, with costs.

W. L. HORN v. R. W. NICHOLAS *et al.*

(Nashville. December Term, 1917.)

1. REPLEVIN. Right to remedy. Note. Possession.

Where defendant's agent sold a third person a farm, taking notes, and the agent forged defendant's signature as indorser, pledging the notes as collateral to the bank, and then made new forged notes, exact duplicates of the true notes, which defendant indorsed believing that he had indorsed the genuine notes, the indorsee could not have replevin to recover the true notes; the delivery of the false notes not having been a valid transference vesting legal title in the indorsee in view of Negotiable Instruments Act (Laws 1899, chapter 94) section 16, making a contract concerning a negotiable instrument incomplete until delivery. (*Post*, p. 459.)

Case cited and approved: *Gregory v. Ross*, 68 Tenn., 599.

2. REPLEVIN. Right to writ. Note. Possession.

Assuming that the indorsee of a false note which both parties thought was the valid note was an equitable assignee, he could not maintain replevin to recover the true note, since one to maintain replevin must show a legal right of possession or ownership as distinguished from such a right recognized in courts of equity. (*Post*, p. 459.)

Cases cited and approved: *Rice v. Crow*, 53 Tenn., 28; *Richmond, etc., Foundry Co. v. Carter*, 133 Tenn., 489.

3. REPLEVIN. Right to writ. Note. Possession. "Delivery."

Where defendant's agent sold a third person a farm, taking notes, and the agent forged defendant's signature as indorser, pledging the notes as collateral to the bank, and then made new forged notes, exact duplicates of the true notes, which defendant indorsed believing that he had indorsed the genuine notes, the indorsee could not have replevin to recover the true notes on

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the theory of constructive delivery, since "delivery" means transfer of possession from one person to another, and there could be no transfer of possession where the transferor had no possession. (*Post*, pp. 459, 460.)

4. **ASSIGNMENTS.** Equitable assignment. Discretion of chancellor. An equitable assignment will be enforced or not in the sound discretion of the chancellor according to justice, but not so as to defeat intervening rights of third persons. (*Post*, pp. 460, 461.)

Case cited and approved: *Trabue v. Bankhead*, 2 Tenn Ch. 412.)

5. **ESTOPPEL.** Purchaser of note. Effect.

Where the maker of a note took over his own note on which the payee's indorsement was forged, his acts were a mere purchase and he could reissue the note and set up estoppel against one claiming as the payee's assignee on a duplicate note which was forged, except as to the payee's indorsement, when the payee had in writing acknowledged the validity of his indorsement of the note bought by the maker. (*Post*, pp. 461, 465.)

Case cited and distinguished: *Morley v. Culverwell*, 7 M. & W., 174.

6. **ESTOPPEL.** Rights of assignees.

When estoppel has once arisen in favor of a party, it inures to the benefit of one thereafter purchasing or taking as security from him. (*Post*, p. 465.)

Case cited and approved: *Holzbog v. Bakrow*, 50 L. R. A. (N. S.), 1028.

FROM DAVIDSON.

Appeal from the Chancery Court of Davidson County.—JNO. ALLISON, Chancellor.

A. W. AKERS, L. J. RUST and F. M. BASS, for Nicholas, et al.

KNIGHT & BEASLEY, for Horn.

Horn v. Nicholas.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

This is one of numerous suits that have arisen by reason of a series of gross frauds perpetrated by one Everett Philpot, who formerly engaged in the business of a real estate agent in the city of Nashville. The bill of complaint in this cause was filed by Horn against R. W. Nicholas, Everett Philpot, W. B. Holcomb, and the Cumberland Valley National Bank to recover, by writ of replevin, from the last-named defendant, the possession of a note for \$2,000, executed by Holcomb to Nicholas, on October 12, 1912, due three years from that date; and, in the alternative, to have that note subjected to the payment of complainant's claim against Nicholas by reason of a claimed assignment thereof to complainant by Nicholas; an impoundment of the note in the hands of the Cumberland Valley Bank also being sought. The history of this note is as follows:

In October, 1912, Philpot, as agent for Nicholas, sold a farm to Holcomb, the latter executing to Nicholas three negotiable notes for \$2,000 each (the one involved here being of the series) due one, two, and three years, respectively, from date, and secured by an express vendor's lien on the realty sold. Philpot was handed the three notes by Nicholas for safe-keeping in a safe in the office of the former.

Philpot borrowed of the Hermitage National Bank \$5,000, and took the three notes from the safe, forged

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the signature of Nicholas as indorser thereon, and pledged the same as collateral to the last-named bank to secure his own note of \$5,000, due in four months from March —, 1913. Philpot's note was renewed several times. Some time prior to June 6, 1914, Holcomb paid to Philpot a sum sufficient to discharge one of the notes, and Philpot paid \$1,000 on his own note to the Hermitage Bank; whereupon Philpot renewed his note to the bank in the sum of \$4,000, with the three \$2,000 notes yet attached as collateral security.

Nicholas, unmindful of the forgery and of the wrongful use Philpot had made of his notes, sought to make use of them in a transaction of his own. Philpot advanced to his client, Nicholas, \$1,717 on the first note of the series, but told him that to further the transaction referred to it would be necessary for him to indorse all of the notes to Philpot. The latter presented to Nicholas three instruments which purportedly were those signed by Holcomb. In fact, Philpot this time had cleverly forged the name of Holcomb as maker to three fictitious notes, exact duplicates of the true notes; and these were indorsed by Nicholas under the belief that he was indorsing the genuine notes of Holcomb to himself. There were then two series: The three genuine notes, with the name of the payee Nicholas forged as indorser, in the possession of the Hermitage Bank; and the three forged notes bearing the genuine signature of Nicholas as indorser. One of the last named Philpot negotiated

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(November 13, 1913) to complainant Horn, who took the same believing, as did Nicholas, that it was one of the true notes executed by Holcomb for the realty.

Rumors of other frauds of Philpot becoming current in the city, the officers of the Hermitage Bank called Nicholas into the banking house, showed him the true Holcomb notes with his name on the back, and asked whether those signatures were his own. Nicholas pronounced the signatures to be his, and at the request of the bank officers executed a written statement (June 9, 1914) to this effect:

"I have been shown three notes (describing them) by the officials of the Hermitage National Bank. I recognize my indorsement on them as genuine."

Holcomb, the maker, was also called in to pass upon the genuineness of his signature, which he did.

Holcomb did his banking business at the Cumberland Valley Bank and desired to have his notes carried by that bank. He applied to that bank for money with which to take the notes over from the Hermitage Bank. A loan of \$4,000 was granted him with the understanding that the two last maturing notes would be brought from the Hermitage Bank and pledged as collateral to Holcomb's note to Cumberland Valley Bank. Holcomb using said funds to acquire them, the Hermitage Bank, with the consent of Philpot, turned the notes over to Holcomb, and two of them were duly pledged as collateral as had been prearranged. It is the last maturing one of said notes that complainant seeks to reach—the counterpart of

the false instrument Nicholas had indorsed to him.

It appears that, at the time Holcomb took the notes from the Hermitage Bank, he had knowledge of the contents of the above-written declaration of Nicholas touching the validity of his indorsement; and held been told by the bank's president that Nicholas had carefully examined the signatures on the backs of the notes. Later on, meeting Nicholas on the streets of the city, Holcomb had referred to the incident of thus vouching to the bank as to the maker's signatures, when Nicholas stated to Holcomb that his own signatures on these notes were also genuine.

It does not appear, however, that Holcomb informed the Cumberland Valley Bank of Nicholas' personal assurance to him, or that Nicholas made any direct representations to that bank respecting the notes. That bank relied upon Holcomb's assuring himself that the notes were genuine in every respect; and the president of the bank says he relied for the validity of the notes in every respect upon the statements made to him by Holcomb, after an examination by the latter. So far as he can recall, the written declaration of Nicholas as to his indorsement was never shown that bank.

It is therefore argued in behalf of complainant Horn that the Cumberland Valley Bank cannot claim that Nicholas is estopped, or that complainant as his privy, is estopped, since the bank was not misled to its hurt in taking the notes as collateral in reliance on anything said to it or done by Nicholas.

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Failing such an estoppel, it is further contended that the defendant bank cannot hold the note sued for under the forged indorsement of Nicholas, and that complainant as transferee of Nicholas is thereby entitled to the relief it seeks.

How far are these insistences of complainant sustainable?

Nicholas is a defendant and has filed no cross-bill seeking affirmative relief.

We have little difficulty in determining that complainant is not entitled to the remedy of replevin to get possession of the note held by the Cumberland Valley Bank.

No delivery of any real note for \$2,000 was made to Horn, and short of that there was no transference of the true \$2,000 note which could vest legal title in him. Since the passage of the Negotiable Instruments Act, every contract on a negotiable instrument is incomplete until delivery of the instrument for the purpose of giving effect thereto. Section 16; also, 3 R. C. L., 967.

Gregory v. Ross, 9 Baxt. (68 Tenn.), 599, is relied upon by complainant as sustaining his contrary insistence; but the rule in that case, if ever sound, has been abrogated by the term of the uniform act.

We need not decide whether the facts gave rise to an equitable assignment of the true \$2,000 note to complainant Horn, in this aspect of the case. If it be conceived or conceded that the indorsement by Nicholas to Horn on the forged note amounted to an

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equitable assignment of one of the real notes, of equal amount and same maturity, to complainant Horn by Nicholas, we think it clear that such an equitable assignee cannot maintain replevin as is here sought. Complainant to that end must show right of possession or ownership by a title recognized at law, as distinguished from one, which is recognized only in courts of equity. *Rice v. Crow*, 6 Heisk. (53 Tenn.), 28; *Richmond etc., Foundry v. Carter*, 133 Tenn., 489, 182 S. W., 240, and cases cited.

But another phase of complainant's bill presents more difficulty. He seeks, as stated, to set up an equitable right to the real note in the possession of the Cumberland Valley Bank, and to demonstrate that the bank has no legal claim to the paper as against Nicholas, because of the forgery of the signature of Nicholas; and therefore that the bank has no defense as against complainant treated as Nicholas' equitable assignee.

We need not decide, in this aspect of the litigation, whether since the enactment of the Negotiable Instruments Law there can be such an equitable assignment of a note, without a delivery actual or constructive; or whether the fact of indorsing the forged note with intention to negotiate and deliver a real one would constitute an equitable assignment of the valid instrument.

But Horn contends that there was a constructive delivery to him by Nicholas. Constructive delivery is recognized in one of the general provisions of the

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Negotiable Instruments Law thus: " 'Delivery' means transfer of possession, actual or constructive, from one person to another." We are unable to comprehend how Nicholas could make a constructive delivery of an instrument that was not in his own possession or control. The true note of Nicholas was in the possession of another, the bank, at the time he purported to transfer it to Horn; and we hold the contention that there was a constructive delivery to be unsound.

If such an equitable assignment be assumed, for purposes of test and disposition of the cause, complainant confronts a difficulty in the doctrine recognized in this State to the effect that the affording of that form of relief is in order to the attainment of just results, and that an equitable assignment will be enforced or not in the sound discretion of the chancellor, according to the circumstances of the case, but not so as to defeat the rights of third persons which have intervened. *Trabue v. Bankhead*, 2 Tenn. Ch., 412; 2 Pom. Eq. Juris. (3 Ed.), section 714.

Did Holcomb in taking over the notes from the Hermitage Bank have a *status* that admits of his asserting an estoppel as against complainant?

Where the maker before its maturity acquires his own note, the common-law authorities were divided as to his right to be treated as a holder for the purpose of reissuance. Some of the cases held that payment in such case extinguished the instrument, so that the maker's subsequent transferee could not hold the other parties to the instrument liable. The doc-

trine of the other line of authorities is thus stated and approved in 8 C. J., 592, where the cases *pro* and *contra* are collected:

“According to the better authority, such a payment operates as a mere purchase, and the payer may reissue the note before maturity, and his transferee may recover thereon against all parties to the instrument as a *bona-fide* holder for value.”

The reasoning in support of the latter rule may be thus summarized: The intention of the maker to pay his paper before maturity is the more improbable. His undertaking is to pay at maturity, not before; “payment means payment in due course and not by anticipation;” before maturity he, as well as a third person, may discount the instrument, and the fact that the paper is in the maker’s possession should not import notice that it has been extinguished. Its negotiability which originally was for the full period up to maturity date is not cut short or destroyed by reason of the fact that it has come into the maker’s possession before maturity.

In *Morley v. Culverwell*, 7 M. & W., 174, 151 Eng. Reprint, 727, Lord ABINGER, C. B., said: “A bill is not properly paid and satisfied according to its tenor unless it be paid when it is due; and consequently if it be satisfied before it is due, by an arrangement between the drawer and acceptor, that does not prevent the acceptor from negotiating it.”

Mr. Daniel, in the last edition of his *Negotiable Instruments* (page 914), after quoting the language

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of the above decision, states that in the first edition he had stated the law to be in accord with the New York or minority rule, but that "examination of the English authorities, and of the South Carolina case, has satisfied him of the error, and that the English view is correct."

This, we believe, is also the conception of bankers and men of commerce as to the rights of such parties; and it evidently was the one acted upon in the instant case. The doctrine admits of convenient results in practical operation, as the facts of this case manifest. The maker was permitted to keep alive the lien securing the note by being allowed to acquire for re-issue; whereas, if the note were to be treated as paid, it would be necessary to create a new lien to secure a fresh note.

The Negotiable Instruments Law, it appears, is framed to accord with this view. By its section 119 (5) it is provided that "a negotiable instrument is discharged when the principal debtor becomes the holder of the instrument at or after maturity in his own right," thus indicating that by acquisition before maturity a discharge, precluding renegotiation does not result. By section 50 it is provided:

"Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this act, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he is personally liable."

The privilege of acquiring in negotiation and of reissuing is thus broadly in favor of any prior party. And by section 30 an instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof.

It therefore appears that if Holcomb was led, as he claims, to acquire the paper from the Hermitage Bank, as from one which held the note under Nicholas' indorsement and which could pass title in a negotiation back to him, he had *status* to invoke estoppel against complainant, claiming in the right of Nicholas. Holcomb would be in the attitude of parting with his money in taking over the paper on faith that the Hermitage Bank held the instruments under valid indorsements. His was a purchase, and he became a holder, qualified and with limited rights it is true; and in respect thereof he could be misled to his hurt. A second satisfaction of his notes would now threaten Holcomb without fault on his part, otherwise.

We hold that upon the facts stated Nicholas is estopped, and that Horn is affected by the same even if he were treated as having the equitable assignment he claims.

When Nicholas gave the written statement to the Hermitage Bank, he must be taken to have understood fully that it related to instruments that were negotiable in character, and that were so to remain until maturity

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dates, long distant; and, further, that it would be relied on by any person in negotiating with the bank for the notes to whom knowledge of the statement might come. He equipped the then holder of the notes with evidence of his own making of the holder's ostensible power to transfer. The case is peculiarly one for the application of the doctrine of estopped *in pais*.

The estoppel having thus once arisen in favor of Holcomb, it inured to the benefit of one thereafter purchasing or taking as security the instruments from him—in this case the *Cumberland Valley Bank*. 10 B. C. L., p. 809; and note to *Holzbog v. Bakrow*, 50 L., R. A. (N. S.), 1028.

The bill of complaint was properly dismissed as to defendants Holcomb and the Cumberland Valley Bank. Affirmed.

DIEHL & LORD v. ROMANS HAILEY, COUNTY COURT
CLERK.

(Nashville. December Term, 1917.)

1. **COMMERCE.** Interstate commerce. Privilege taxes. Sale of alcoholic beverages.

Acts 1917, chapter 70, imposing a privilege tax on wholesale dealers in foreign-made nonintoxicating beverages containing alcohol, and on domestic manufacturers of such drinks, is unconstitutional within Const. U. S. article 1, section 8, sub-section 3, as imposing a burden on interstate commerce. (*Post*, pp. 468-470.)

Acts cited and construed: Acts 1917, ch. 70.

Case cited and distinguished: *I. M. Darnell & Son Co. v. City of Memphis*, 208 U. S., 113.

2. **COMMERCE.** Interstate commerce. Taxes.

Mere fact that tax was imposed on manufacture in the State of nonintoxicating alcoholic beverages larger than that imposed on wholesalers of such drinks made outside the State does not justify the classification in Acts 1917, chapter 70, and the omission therein to tax wholesalers of the domestic product. (*Post*, pp. 470, 471.)

Cases cited and approved: *Welton v. Missouri*, 91 U. S., 275; *Guy v. Baltimore*, 100 U. S., 434; *Webber v. Virginia*, 103 U. S., 344.

3. **COMMERCE.** Interstate commerce. Taxes.

Conceding that only foreign-made nonintoxicating alcoholic beverages were ever in the State, Acts 1917, chapter 70, imposing tax only on wholesalers of such foreign-made beverages, is invalid as an imposition on interstate commerce. (*Post*, p. 271.)

FROM DAVIDSON.

Appeal from the Chancery Court of Davidson County.—M. T. BRYAN, Special Chancellor.

HILL McALISTER, for appellant.

M. P. O'CONNOR and NORMAN FARRELL, for appellee.

MR CHIEF JUSTICE NEIL delivered the opinion of the Court.

The complainant, Diehl, is a wholesale merchant doing business at Nashville, Tenn., under the trade-name of Diehl & Lord. In course of his business he purchased from time to time certain carload lots of "Bevo" of Anheuser-Busch Brewing Company, located at St. Louis, Mo. When a carload arrives his custom is to open the car and transfer the cases of "Bevo," each containing two dozen bottles, to his warehouse, where it rests until it is resold by him, in the original unbroken cases, to his customers, who are dealers in different portions of the State.

In 1917 the legislature of the State imposed a privilege tax: "Wholesalers or jobbers or bottlers of foreign made nonintoxicating beverage drinks containing alcohol or hops, or cereal, each, per annum, \$200." Laws 1917, chapter 70.

At the same time there was imposed a tax on:

"Manufacturers of nonintoxicating beverage drinks containing alcohol, or hops, or cereal, each, \$300." "Bevo" falls within the description given; and therefore the defendant clerk sought to collect this tax from complainant as a wholesale dealer engaged in its sale, demanding \$200 for the State and \$200 for Davidson county, and, on complainant's refusal to pay,

he caused a distress warrant to issue. Under this threatened compulsion complainant, as required by statute, paid the State's demand under protest, and filed his bill to recover the sums so paid, and to enjoin the enforcement of the county's demand, charging the invalidity of the tax on the ground that it was a violation of the interstate commerce clause of the federal Constitution—subsection 3 of section 8 of article 1 of that instrument. The defendant contested the charge of unconstitutionality. The chancellor sustained complainant's contention, and the defendant appealed.

The chancellor reached the correct conclusion. The tax is in violation of the interstate commerce clause of the federal Constitution, imposing, as it does, a discriminatory burden on goods shipped into this State from a foreign State, on the ground of their foreign origin, since to impose a privilege tax on a dealer in such goods simply because they were shipped here from another State is in its practical effect a tax on the goods themselves. It is immaterial, in respect of the particular question before us, that the goods had come to a rest within this State, and were held in store for sale to other dealers, from time to time, as opportunity might offer. The latter fact is important in determining whether any tax at all can be imposed, even though equal and uniform with that on similar articles within the State, inasmuch as no tax whatever can be levied upon the mere introduction of an article of merchandise from a foreign

State, because such tax would necessarily operate as a direct burden on interstate commerce; whereas such equal taxation can be imposed after the merchandise has come to a rest in the State, and is held here for sale. But a tax on such goods, based on their foreign origin, placing no equivalent tax on other goods of the same kind produced in the State, is a tax discriminating against the foreign-source goods, and is unlawful no matter at what stage between the producer and the consumer it may be imposed. *I. M. Darnell & Son Co. v. City of Memphis*, 208 U. S., 113, 28 Sup. Ct., 247, 52 L. Ed., 413, and cases cited. Its direct and unescapable effect would be to discourage dealing in such goods, and hence ultimately prevent the introduction of them into the State. To sanction such legislation would result in justifying the building a tariff wall around the State in violation of both the letter and the spirit of the interstate commerce clause—in our judgment one of the wisest and most beneficent provisions of our federal Constitution; on the maintenance of which in truth depends the very existence of our country, as pointed out by Mr. Justice MILLER in the following excerpt from his Lectures on the Federal Constitution. Said that very able judge:

“Notwithstanding for nearly one hundred years we have had in the federal Constitution that Congress shall have power to regulate commerce among the several States, there are at this hour upon the statute books of almost every State laws violating that pro-

vision; and there is no doubt that if that clause were removed tomorrow, this Union would fall to pieces, simply by reason of the struggles of each State to make the property owned in other States pay its expenses. It was this tendency of each State to support its government out of taxes levied upon the property of other States, or on the produce or merchandise which must go through one State or another, that more than any other one thing compelled the formation of the present Constitution." Lectures. p. 81.

This a sound and weighty observation.

But it is said that the tax imposed does not effect a discrimination against foreign goods, because the same statute imposes a larger privilege tax, \$300, on the manufacture of similar goods within this State. This argument does not meet the difficulty, because its only basis is the unsound proposition that a privilege tax levied on one occupation is a true criterion by which to judge of another privilege tax levied upon another and distinct occupation, in respect of the burden which the latter will impose upon the goods with which the business of each is concerned. The basis is inadmissible; it furnishes no true measure, because the things to be compared are each uncertain, nor do they belong to the same class, nor does either fall within a class represented by the other. It does not appear how many wholesale dealers of the foreign goods there are in the State, nor how many factories are operating within the State, making goods of a similar kind, nor is it possible to forecast how many of

either there will be within any given period. On this ground alone, to say nothing of other reasons suggested, it is impossible to determine that the burden imposed on local production of similar goods will offset the burden which the tax in question imposes on foreign goods. In truth the whole inquiry is irrelevant. The fact that the tax is imposed solely on wholesale dealers in the foreign goods, and no tax the same in kind and amount on wholesale dealers in similar goods of local origin, is sufficient to stamp it as discriminatory, and unconstitutional. *Welton v. Missouri*, 91 U. S., 275, 23 L. Ed., 347; *Guy v. Baltimore*, 100 U. S., 434, 25 L. Ed., 743; *Webber v. Virginia*, 103 U. S., 344, 26 L. Ed., 565.

We go yet further, and hold that even if no goods of similar kind were manufactured or owned in this State, a tax could not be sustained against these goods, or one dealing in them, based simply on the ground that they were of foreign origin. That would be a classification purely arbitrary, without the slightest support in reason or foundation in common sense; and this, because no State has the power, under our constitutional system, to exclude or even discourage the introduction of foreign goods into its borders. So, the classification is an idle one, and as useless as if it had never been made. Therefore it can furnish no basis for the levying of an occupation or other tax. Let the judgment be affirmed, with costs.

STATE BANK & TRUST CO. v. NASHVILLE TRUST CO.

(Nashville. December Term, 1917.)

1. **CERTIORARI. Time for petition.**

Under Thompson's Shannon's Code, section 6321a2, providing that *certiorari* to review judgment of the court of civil appeals shall not be issued after ninety days from final judgment of such court, the statutory period runs from the date of the denial of the first petition for rehearing. (*Post*, pp. 473, 474.)

Code cited and construed: Sec. 6321a2 (T-S.).

2. **CERTIORARI. Time for petition.**

Since a second petition for rehearing by the same party is not recognized by the rules of the appellate courts, such petition, when denied, cannot be availed of to extend the ninety-day period within which writ of *certiorari* to review the judgment must be applied for. (*Post*, p. 474.)

FROM DAVIDSON.

Appeal from the Circuit Court of Davidson County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—A. G. RUTHERFORD, Judge.

T. G. EWING, for Hattie Parks.

H. A. LUCK, McCARLEY & STEPHENSON and JORDAN STOKES, SR., for Nashville Trust Co.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

The question for decision is whether the petition for *certiorari* to review the judgment of the court of civil appeals adverse to petitioner was filed within the period of ninety days allowed by statute for such filing.

By Thompson's Shannon's Code, section 6321a2, it is provided that such *certiorari* shall not be issued after the lapse of ninety days from the final decree or judgment of the court of civil appeals.

The court of civil appeals dismissed the appeal and affirmed the judgment of the circuit court on October 18, 1917.

A petition to rehear was filed, and denied on November 5, 1917.

A second petition to rehear was filed in that court on November 5, 1917, and denied by minute entry of date January 22, 1918.

The insistence of the petitioner is that the last-mentioned entry constituted the final judgment of the court of civil appeals, and that the ninety days began to run from that date.

(a) We hold that the statutory period ran from the date of the denial of the first petition to rehear—November 5, 1917. The petition for *certiorari* was not presented to this court until March 13, 1918, and it came too late.

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(b) A second petition to rehear, denied by the court, cannot be availed of to extend the ninety-day period. If so a third and fourth petition could be resorted to, resulting in indefinite delays. A second petition to rehear by the same party is not recognized by the rules of the appellate courts.

We do not mean to indicate that, should the court of civil appeals grant a petition to rehear and rehear the cause, its disposition thereof might not be the final disposition or judgment, within the meaning of the statute.

We do not pass on the further question as to the running of the statutory limitation against a party adversely affected by a ruling on a petition to rehear where the court reverses its former ruling and grants relief as prayed in the petition to rehear. The petition of such other party might be treated as his first petition to rehear under (a) above.

Writ denied.

J. B. WALKER v. J. K. P. DAVIS.*(Nashville. December Term, 1917.)***1. FORCIBLE ENTRY AND DETAINER. Nuisance. Private nuisance. Abatement.**

Where one was in actual possession of land under a deed defining its boundaries, his possession was violated when another fenced in a part of the land, and thus erected a private nuisance thereon, so that right of action accrued to him to proceed by forcible entry and detainer, or to abate the nuisance. (*Post*, p. 477.)

Cases cited and approved: *Earl of Lonsdale v. Nelson*, 2 B. & C., 311; *Amoskeag Co. v. Goodale*, 46 N. H., 53; *Rhea v. Forsyth*, 37 Pa., 503; *State v. Parrott*, 71 N. C., 311; *Adams v. Barney*, 25 Vt., 225; *Roberts v. Rose*, L. R.; 1 Ex., 82; *Penruddock's Case*, 5 Coke, 101; *Harvey v. Dewoody*, 18 Ark., 252; *Moffett v. Brewer*, 1 G. Greene (Iowa), 348; *State v. Moffett*, 1 G. Greene (Iowa), 247; *Gates v. Blincoe*, 2 Dana (Ky.), 158; *City of Chillicothe v. Bryan*, 103 Mo. App., 409; *Great Falls Co. v. Worster*, 15 N. H., 412; *Lawrence v. Hough*, 35 N. J. Eq., 371; *Lyle v. Little*, 83 Hun (N. Y.), 532; *Harrower v. Ritson*, 37 Barb. (N. Y.), 301; *Lancaster Turnpike Co. v. Rogers*, 2 Pa., 114.

2. NUISANCE. Private nuisance. Abatement.

One having a right of action for a private nuisance on his land created by another may help himself personally by abating it, if he can do so without a breach of the peace. (*Post*, pp. 477-480.)

3. REPLEVIN. Plaintiff's right of possession. Change.

Complainant, in extending his fence over land in defendant's possession and leaving it there, created a private nuisance, and did not effect a lawful change of possession, so as to entitle him to replevy logs and timber cut and removed from the land by defendant on his abating the nuisance by tearing down the fence. (*Post*, pp. 480-481.)

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Case cited and approved: Lieberman v. Clark, 114 Tenn., 117.

4. **REPLEVIN. Right of possession. Title.**

Where one claiming a tract of land to limits of the boundary shows an actual possession under a deed defining boundaries, when another invades it, fells timber, and cuts it into logs, he may replevin the logs left on the ground, and it is unnecessary for him to show title, and a similar showing is also sufficient to defeat replevin against him by the invader for logs cut from the land. (*Post*, pp. 481, 483).

Case cited and approved: Wheeler v. Clark, 69 L. R. A., 732.

FROM CLAY.

Appeal from the Chancery Court of Clay County.
—A. H. ROBERTS, Chancellor.

W. R. OFFICER and M. C. SIDWELL, for plaintiff.

E. C. KNIGHT and JNO. H. McMILLIN, for defendant.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

Defendant Davis and those under whom he claimed had been in the actual possession of the tract of land on which he was living at the time the present controversy arose, for very many years, under deeds purporting to convey an estate in fee, and claiming to the full extent of the boundaries described therein. Complainant, some years after the

defendant had entered upon the land under his deed defining boundaries, and after defendant had thus obtained the actual possession to the limit of the boundaries, secured a deed for another tract, the calls of which at one point, to a depth of fifty or sixty yards, overlapped defendant's possession. Thereafter complainant proceeded to fence the land so covered by his deed with a wire fence, and extend this wire over upon the defendant's possession, in a half-moon shape, to the depth above indicated, so as to take in a part of the land covered by defendant's prior deeds and possession. The complainant then entered upon this half-moon sector and cut valuable timber standing thereon, and sawed it into the customary log lengths, but left the logs lying on the ground.

While matters were in this state, the defendant entered upon the sector, and, without a breach of the peace, tore away the wire fencing, removed the logs the complainant had left on the ground, and felled other trees standing on the same sector, sawed them into logs, and removed the logs. Thereupon the complainant brought his replevin suit in the chancery court to recover all of the logs. The chancellor decreed in favor of the defendant, and on appeal the court of civil appeals affirmed the decree.

The decree was obviously correct on the following principles: The defendant being in actual possession of land by residence thereon under a deed defining

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boundaries, and claiming to the limit of the stated bounds, and so in actual possession of the whole tract lying within the bounds, the complainant violated that possession when he built his wire fence in the manner stated, and so erected a private nuisance on the land thus occupied by the defendant. A right of action at once accrued to the defendant to institute proceedings in forcible entry and detainer, or proceedings in court to abate the nuisance. When such is the case, that is, when the law gives a right of action for redress under the facts, the party may also help himself by personally abating the nuisance, if he can succeed in effecting this result without a breach of the peace. 2 Wood on Nuisances (3 Ed.), pp. 1282-1286, embracing sections 844, 845, 846. See, also, the following cases cited under section 844; *Baten's Case*, 9 Coke, 55; *Earl of Lonsdale v. Nelson*, 2 B. & C., 311, per BEST, J.; *Amoskeag Co. v. Goodale*, 46 N. H., 53, 56; *Rhea v. Forsyth*, 37 Pa. St. 503, 78 Am. Dec., 441; *State v. Parrott*, 71 N. C., 311, 17 Am. Rep., 5; *Adams v. Barney*, 25 Vt., 225; *Roberts v. Rose*, L. R., 1 Ex. 82; *Penruddock's Case*, 5 Coke, 101, n, a and b.

In *Brown v. Perkins*, 2 Gray (Mass.) 89, it was said by SHAW, Chief Justice: "The true theory of abatement of nuisance is that an individual citizen may abate a private nuisance injurious to himself when he could also bring an action; and also, when a common nuisance obstructs his individual right, he may

remove it to enable him to enjoy that right, and he cannot be called in question for so doing."

"This," says Burdick in his Law of Torts, "is not only one of the most ancient forms of self-help, but also one of the most important at the present time." Id., p. 194. As showing the ancient character of the right, the author cites the following passage from Bracton, De Legibus Angliæ, Lib. 3, p. 233:

"But those things which have thus been raised to cause a tortious nuisance . . . may be immediately and recently whilst the misdeed is flagrant (as in the case of other disseysines) demolished and thrown down . . . if the complainant is sufficient to do it; but if not he must have recourse to him who protects rights."

The right, however, though very clear and of very ancient origin, must be used, as all of the authorities hold, with great care to avoid the commission of any excess, and all breaches of the peace. The counsel therein given is, that it is best to proceed by court action, rather than by one's own act. Nevertheless, the right exists, and in a proper case may be exercised. See the following cases in addition to those cited supra: *Harvey v. Dewoody*, 18 Ark., 252; *Moffett v. Brewer*, 1 G. Greene (Iowa), 348; *State v. Moffett*, 1 G. Greene (Iowa), 247; *Gates v. Blincoe*, 2 Dana (Ky.), 158, 26 Am. Dec., 440, and note; *City of Chillicothe v. Bryan*, 103 Mo. App., 409, 77 S. W., 465; *Great Falls Co. v. Worster*, 15 N. H., 412, 439; *Lawrence v. Hough*, 35 N. J. Eq., 371;

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Lyle v. Little, 83 Hun (N. Y.), 532, 33 N. Y. Supp., 8; *Harrower v. Ritson*, 37 Barb. (N. Y.), 301; *Lancaster Turnpike Co. v. Rogers*, 2 Pa. St., 114, 44 Am. Dec., 179.

The complainant's act of violence in extending his fence over upon land in the defendant's possession, and leaving the fence there, created a private nuisance, and did not effect a lawful change of the possession. So, when defendant had abated the nuisance, and had thus removed the obstruction, he was within his rights when he carried off the logs lying on the ground, and cut down other trees on the same land, turned them into logs, and removed these. The complainant, by his illegal act in committing the nuisance, acquired no right to the possession of the timber, and therefore had nothing on which to base his action of replevin. On this ground we think the decree of the Chancellor and of the court of civil appeals should be affirmed.

These two courts based their decrees on the ground that defendant had been in possession of the land on which the timber grew, himself, and those under whom he claimed, for more than seven years, and for more than twenty years claiming, to the boundaries, under deeds purporting to convey an estate in fee, and so had acquired title; that the timber growing on the land was a part thereof, and so title to it was in defendant; that title implied the right to possession; and that complainant's felling the timber and cutting it into sawlogs could not change the title, or impair the right of possession implied from title, and so the

logs were the property of the defendant, and he was entitled to their possession. The complainant's opposing theory was that he had acquired possession of the timber by erecting the fence, that the title to the land was not involved, and that his remedy was in replevin, and relied on *Lieberman v. Clark*, 114 Tenn., 117, 85 S. W., 258, 69 L. R. A., 732.

It was held in the case cited that where one's timber is taken from land of which he has actual possession under color of title, he may obtain redress by the writ of replevin by simply proving his right of possession without raising the question of the title to the land on which the timber was standing when it was felled and taken, though it was conceded that sometimes it may be essential to show title to the land in order to show title to the timber which it produced and a right to the possession thereof.

So, in the case before us, if the defendant, instead of adopting the plan of "self-help" which he did adopt, had brought replevin for the logs that complainant left on the ground, he could have succeeded merely by showing that he was in the actual possession of the land at the time the complainant invaded it, and felled the timber, and cut it into logs. That would have made a practical parallel of the case of *Lieberman v. Clark*. It would not have been necessary for him to go further and show title. True, by showing title he would have done no harm, but only produced more evidence than was necessary to maintain the case.

When *Lieberman v. Clark* was decided, it was believed that the fundamental principle there announced (supported by the great weight of authority; and on this point, also, see note to the same case as reprinted in 69 L. R. A., 732, *sub nom. Wheeler v. Clark*) would prove very beneficial toward quieting land litigation in the State, for the reasons fully stated in the opinion, and which need not be repeated here. The result has justified the belief we entertained at the time.

We should not deem it necessary to refer in so much detail to *Lieberman v. Clark*, but for the fact that the learned chancellor, who decided the case now before us for review, seems to have ignored that authority, and the learned court of civil appeals used some expressions in its opinion that seem to indicate a misconception of the meaning of that decision.

Recurring now to the facts of the present case: It was sufficient, we repeat, to prove that defendant was in actual possession of the land under a writing defining its boundaries, and was claiming to the limits of the boundary at the time the land was invaded, and the timber felled. Such evidence showed possession, and right of possession, of the timber at that time, and that complainant was in the wrong. It was not necessary that defendant should go further and show title. The chief principle enunciated in *Lieberman v. Clark* was that an aggressor could not by entering on land occupied by another and taking timber therefrom force the latter, in order to obtain redress, to

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expose his title to the hazards of litigation. The dangers of such an enterprise are pointed out in the case just referred to.

However, there is no error in the result reached by the chancellor and the court of civil appeals, and those decrees are affirmed, with costs.

ROLLIE GALOWAY v. STATE.

(Nashville. December Term, 1917.)

1. CONSTITUTIONAL LAW. Due process of law.

Priv. Acts 1915, chapter 564, section 20, requiring the owner to furnish a wagon and team for road work, and feed therefor, does not violate Constitution article 1, section 8, providing that no man shall be deprived of his property, but by the judgment of his peers and the law of the land. (*Post*, pp. 486-493.)

Acts cited and construed: Acts 1915, ch. 564, sec. 20; Acts 1804, ch. 1, sec. 8.

Cases cited and approved: *Toone v. Alabama*, 178 Ala., 70; *Franklin v. Maberry*, 25 Tenn., 368; *Chattanooga v. Southern R. Co.*, 128 Tenn., 399.

Cases cited and distinguished: *Butler v. Perry*, 240 U. S., 328; *Goddard*, Petitioner, 16 Pick. (Mass.), 504; *State v. McMahon*, 76 Conn., 97.

Constitution cited and construed: Art. 1, sec. 8.

2. EMINENT DOMAIN. Taking property for road work.

Neither does it, as to the wagon and team, violate Constitution article 1, section 21, forbidding the taking of property for public use without compensation; but as to the feed it does. (*Post*, pp. 493, 494.)

3. STATUTES. Partial invalidity. Effect.

The statute is not entirely invalid because of the invalidity of the requirement as to feed. (*Post*, pp. 493, 494.)

Cases cited and approved: *Barron v. Memphis*, 113 Tenn., 89; *Posey Township v. Senlour*, 42 Ind. App., 580; *State v. Dawson*, 3 Hill (S. C.), 100.

4. HIGHWAYS. Work on road. Impressment of wagons and teams.

The impressment of the wagon and team under the statute does

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not depend on the owner's liability to perform personal service.
(*Post*, p. 495.)

FROM MARSHALL.

Error to the Circuit Court of Marshall County.—
W. B. TURNER, Judge.

R. E. HAYNES, for plaintiff in error.

FRANK M. THOMPSON, Attorney General, and ARM-
STRONG, ARMSTRONG & MARSHALL, for the State.

MR. JUSTICE WILLIAMS delivered the opinion of the
Court.

The plaintiff in error was convicted on an indictment which charged that he wilfully failed and refused to furnish a wagon and team for work on a public road, after having been legally notified and warned to do so.

The road law for Marshall county is Private Acts 1915, chapter 564. Section 20 of the act provides that any person owning a wagon and team shall be required to furnish same the full number of days required to work a district road; and it is further stipulated that the owner of said wagon and teams shall furnish the necessary feed for each team. A fine is provided to be imposed for a violation. It is said in

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argument that similar provisions are to be found in statutes applying to other populous counties, such as Maury, Giles, Sumner, Lincoln, and Madison.

In behalf of Galoway it is assigned for error that the above statutory requirements are violative of article 1, section 8, of the Constitution of 1870, and also of article 1, section 21, of the fundamental law.

The case chiefly relied upon by plaintiff in error is *Toone v. Alabama*, 178 Ala., 70, 59 South., 665, 42 L. R. A. (N. S.), 1045, which holds that subjecting animals and implements suitable for road work in the county to that duty a certain number of days each year violates a constitutional provision forbidding the taking or applying to public use of private property without just compensation. This appears to be the only reported case that rules the point. We are not satisfied with the reasoning of, or the result reached by, the Alabama court, so far as its decision relates to wagons and teams sought to be made temporarily subject to road service.

The court in that case draws a distinction between the labor of an individual and the service of his animals and implements in that regard, thus:

“The books have been examined in vain for an authority which will authorize the exaction from a citizen of the contribution of his property for public service, under the theory that it is his duty as a citizen to so contribute. The State may exact the performance of this personal obligation, or provide a reasonable commutation for same by way of an assessment;

but it cannot confiscate his property by devoting it to public use."

We are of opinion that the distinction was not well made. There was left out of view the legal history of the road duties imposed upon landowners, in the light of which history the constitutional provision should be read.

1. As to the conscription of wagons and teams of appellant:

"*Trinoda necessitatis*," meaning the three-fold necessary public duties, viz., repairing bridges, maintaining castles or garrisons, and going on expeditions to repel invasions, phrased the burden to which all owners of lands were held liable by the Saxon law. Black, L. Dict. and 38 Cyc., 1994.

Recently the supreme court of the United States had under review a statute of Florida which required every able-bodied male person over the age of twenty-one years, and under the age of forty-five years, to work on the roads and bridges of the county, and that court made this reference to the rule of the ancient law of the Saxons in England:

"In view of ancient usage and the unanimity of judicial opinion, it must be taken as settled that, unless restrained by some constitutional limitation, a State has inherent power to require every able-bodied man within its jurisdiction to labor for a reasonable time on public roads near his residence without direct compensation. This is a part of the duty which he owes to the public. The law of England is thus de-

clared in Blackstone's Commentaries, bk. 1, page 357:

“ ‘Every parish is bound of common right to keep the highroads that go through it in good and sufficient repair; unless by reason of the tenure of lands, or otherwise, this care is consigned to some particular private person. From this burthen no man was exempt by our ancient laws, whatever other immunities he might enjoy: this being part of the *trinoda necessitas*, to which every man's estate was subject, viz. *expeditio contra hostem, arcium constructio, et pontium reparatio*. For, though the reparation of bridges only is expressed, yet that of roads also must be understood; as in the Roman law, with respect to the construction and repairing of ways and bridges no class of men of whatever rank or dignity should be exempted.’ ” *Butler v. Perry*, 240 U. S., 328, 36 Sup. Ct., 258, 60 L. Ed., 672.

To quote further from Blackstone (page 358) is to demonstrate that upon local authorities were devolved the following duties:

“ ‘They are to call together all inhabitants and occupiers of lands, tenements and hereditaments within the parish, six days in every year to labor in fetching materials, or repairing the highways; all persons keeping draughts (of three horses, etc.), or occupying lands, being obliged to send a team for every draught, etc.’ ”

There was, as thus seen, from early times laws requiring the use of teams along with the personal services of the one subject to labor. The court in

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Butler v. Perry, supra, partially traced this feature along with that of the conscription of personal service in early colonial and territorial statutes, noting that the legislative body of the Northwest Territory in 1792 provided for the warning in of inhabitants to work on the highways, every such one to repair to the place appointed "with such utensils and tools as may be ordered him wherewith he is to labor, etc." A like provision is to be found in the early legislation of our mother State, North Carolina. Laws N. C. 1784, chapter 14. Shortly after the admission of this State into the Union, it was by Acts 1804, chapter 1, section 8, provided that the overseer of roads should notify all owners of slaves to send their male servants from fifteen to fifty years of age to work the roads; and, by section 10, to give notice to owners what kind of tools they should "bring and work with" on the roads. It would seem that to impress human chattels was, if not a greater, then not a less, exertion of power than is the impressment of live stock.

Generally, and in this State, it is held that the police power may justify a municipality's requiring landowners to construct, at their own expense, sidewalks in front of their lots. *Franklin v. Maberry*, 6 Humph. (25 Tenn.), 368, 44 Am. Dec., 315, and cases in accord; note 28 L. R. A. (N. S.), 1132. The burden incident thereto is appreciably greater than the one imposed upon the estates of inhabitants of the rural districts by the statute here involved.

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To the police power, rather than to the power of taxation, is referred the power of a municipality, under legislative grant, to require a lot owner to remove snow from the sidewalk in front of his holding, though it is apparent that to some extent he must use personal property, such as implements, in so doing. The exercise of the power does not conflict with constitutional inhibitions against the taking of private property for public purposes. The leading case is that of *Goddard, Petitioner*, 16 Pick. (Mass.), 504, 28 Am. Dec., 259; the opinion being delivered by Chief Justice SHAW. It embodies an *obiter* statement (italicized by us below) which bears upon the instant case; but a *dictum* from that eminent jurist is of great weight. It is said:

“It is not speaking strictly, to characterize this city ordinance as a law levying a tax, the direct or principal object of which is the raising of revenue. It imposes a duty upon a large class of persons, the performance of which requires some labor and expense, and therefore indirectly operates as a law creating a burden. But we think it is rather to be regarded as a police regulation, requiring a duty to be performed, highly salutary and advantageous to the citizens of a populous and closely built city, and which is imposed upon them because they are so situated as that they can most promptly and conveniently perform it; and it is laid not upon a few, but upon a numerous class, all those who are so situated, and equally upon all who are within the description com-

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posing the class. It is said to be unequal because it singles out a particular class of persons, to wit, the owners and occupiers of real estate, and imposes the duty exclusively upon them. If this were an arbitrary selection of a class of persons, without reference to their peculiar fitness and ability to perform the duty, the objection would have great weight, as, for instance, if the expense of clearing the streets of snow were imposed upon mechanics or merchants, or any other distinct class of citizens, between whose convenience and accommodation, and the labor to be done, there is no natural relation. But suppose there is a class of citizens who will themselves commonly derive a benefit from the performance of some public duty, we can see no inequality in requiring that all those who will derive such benefit shall by a general and equal law be required to do it. *Supposing a by-law should require every inhabitant, who keeps a cart, truck or other team, or a coach or other carriage, to turn out himself, or send a man, with one or more horses, after each heavy fall of snow, to assist in leveling it. Although other citizens would derive a benefit, . . . I can at present perceive no valid objection to a by-law requiring it on the ground of the inequality. . . .* In all these cases the answer to the objection of partiality and inequality is that the duty required is a duty upon the person in respect to the property which he holds, occupies and enjoys, under the protection and benefit of the laws; that it operates on each and all in their

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turns, as they become owners and occupiers of such estates, and it ceases to be required of them when they cease to be such holders and occupiers of the estate, in respect to which the duty is required."

As said on the same subject in *State v. McMahon*, 76 Conn., 97, 106, 55 Atl., 591, 594:

"To say that a law defining the duties of citizens in serving the State is necessarily a violation of the constitutional guaranties against the confiscation of property and partial and arbitrary discriminations, because the service is unpaid, or is one that all citizens are not in a situation to render, is to state a proposition which is radically unsound. Such a theory of selfish immunity from all duties inherent in citizenship is supported by no principle of political ethics, and cannot safely be reduced to practice under any government."

The right of the State to enforce such an obligation we hold to be referable to its inherent police power to promote the safety, order, and comfort of society within its borders, as distinguished from the powers of taxation and eminent domain. *Chattanooga v. Southern R. Co.*, 128 Tenn., 399, 161 S. W., 1000, and cases cited.

The supreme court, in *Butler v. Perry*, supra, upheld a contention that limitations of the national Constitution there invoked should not be construed to run counter to ancient usages, unless it be compelled. Speaking of the Thirteenth Amendment to the federal Constitution, the court said that it introduced

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no novel doctrine with respect to services always treated as exceptional, and certainly was not intended to interdict enforcement of those duties which individuals owe to the State. It was further held that, while personal services or labor must be considered as property, there was no merit in the contention that labor when so conscripted was property, the taking of which by the State without compensation, for the building or maintenance of public roads, could be denounced under the provisions of the Fourteenth Amendment. This answers the attack made upon the above statutory provision under article 1, section 8, of our Constitution.

So, also, we are of opinion that the taking of property, such as wagons and teams, along with the labor of individuals, for such use for five days each year, being one that had been recognized from the dawn period of our law, and through many generations prior to and after the organization of our State, should not be deemed to be a "taking" within the meaning of article 1, section 21, providing that no man's property shall be taken or applied to public use, without just compensation being made therefor. It is not a substantial or serious interference with private personal property materially lessening its value, but it is an impressment of the same for temporary service in an exigency which the legislature thought sufficient to bring it into requisition, the age-long legislative recognition of which, prior to the adoption of the Constitution,

argues against an intent to abrogate on the part of the makers of the fundamental law.

II. As to the provision in the statute that owners of teams shall furnish the necessary feed therefor:

We are of opinion that a different result must be declared in respect to the attempt to require the owner to furnish feed for his teams while in service on public roads.

Personal property equally with realty is subject to be taken under the power of eminent domain for a public use. 15 Cyc., 603.

The purpose of the act was not to press the feed into a temporary use, but to work its absolute appropriation. That appropriation must result, the articles being necessarily consumable in the use. *Barron v. Memphis*, 113 Tenn., 89, 80 S. W., 832, 106 Am. St. Rep., 810. There remains nothing to be returned to the owner. The argument of the Alabama court in the Noone Case is sound when applied to this feature of the statute.

Appropriation of timber for the construction of bridges, or of gravel or stone for the roadbed, may not be made without compensation, as under the law of eminent domain. *Posey Township v. Senour*, 42 Ind. App., 580, 86 N. E., 440; *State v. Dawson*, 3 Hill (S. C.), 100.

The invalidity of this particular provision of the statute does not bring the entire act to naught.

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III. As to subjection of teams in the county belonging to a citizen and resident of another county:

The lands of plaintiff in error to be benefited by the road to be worked were situated in Marshall county and his wagon and team were permanently located there; and the latter were liable to road duty in that county, notwithstanding the fact that Galoway lived in an adjoining county.

It appears that the early usage, in this State at least, did not make the impressment of one's property dependent upon his liability to perform personal service. For example, a minister of the gospel was exempt in respect of personal labor, but he was required to send his slaves. We think this indicates the fair construction of the act under examination. Galoway is indicted, not for failure to work in person, nor yet for failure to furnish feed, but for a refusal to furnish his wagon and team.

Affirmed.

EMILY C. WINTERS *et al.* v. LUCILE MARCH *et al.***(Nashville. December Term, 1917.)****1. TRUSTS. Duration.**

The duration of a trust depends upon the purposes thereof; and when such purposes have been accomplished, the trust ceases. (*Post*, pp. 501, 502.)

Cases cited and approved: *Walt v. Walt*, 113 Tenn., 189; *Dunham v. Harvey*, 111 Tenn., 620; *Temple v. Ferguson*, 110 Tenn., 84; *Henson v. Wright*, 88 Tenn., 501; *Jourolmon v. Massengill*, 86 Tenn., 81; *Davis v. Williams*, 85 Tenn., 646; *Hooberry v. Harding*, 78 Tenn., 397; *Henderson v. Hill*, 77 Tenn., 25.

Case cited and distinguished: *Ellis v. Fisher*, 35 Tenn., 231.

2. PERPETUITIES. Trusts. Termination.

A will leaving the residuary estate in trust to the firm to which a testator belonged as trustee "for my said wife and three children, share and share alike, the income derived therefrom by said trustees to be paid over to my said wife and children as their necessities demand," and providing that if it should be unnecessary to encroach upon the income, then such income was to be invested, but not providing for any devise over, created a trust which would cease as to each beneficiary at death; each devisee being entitled to receive a portion of the income from his share as his necessities might demand, and after the death of the beneficiaries the share of each would go to his or her devisee, distributee, or heir, and therefore the bequest was not void, creating a perpetuity. (*Post*, pp. 502, 503.)

Cases cited and approved: *Temple v. Ferguson*, 110 Tenn., 84; *Ellis v. Fisher*, 35 Tenn., 231; *Smith v. Metcalf*, 38 Tenn., 64; *Rogers v. White*, 33 Tenn., 68.

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3. TRUSTS. Merger of estates.

Where a will devised a testator's residuary estate to trustees for the benefit of his widow and children, the bequest did not merge the estate with the remainder, where the trust was active, and merger would have defeated testator's intention. (*Post*, pp. 503, 504.)

Cases cited and approved: *Davis v. Williams*, 85 Tenn., 646; *Henderson v. Hill*, 77 Tenn., 25; *Jourolmon v. Massengill*, 86 Tenn., 93.

Case cited and distinguished: *Henson v. Wright*, 88 Tenn., 501.

FROM DAVIDSON.

Appeal from the Chancery Court of Davidson County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—JOHN ALLISON, Chancellor.

STOKES & STOKES, for complainant.

JNO. B. DANIEL and T. J. McMorrough, for defendants.

MR. JUSTICE FENTRESS delivered the opinion of the Court.

This cause involves a contest over the validity of a trust created by the sixth item of the will of G. W. Winters, deceased. The bill was filed by the widow and children of the testator against his grandchildren, who are all minors, and W. F. Hardison, one of the trustees named in the will.

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The chancellor adjudged the trust void, and the court of civil appeals sustained his decree. This court granted the writ of *certiorari* to that court, and the cause has been argued here.

The case is presented upon an agreed statement of facts, in which it appears that the deceased was survived by his widow, two sons, and one daughter. It is shown that by successful trading and frugality he had accumulated real and personal property of the value of approximately \$250,000, and had effected upon his life policies of insurance, payable to his estate, for more than \$50,000. The testator also left life insurance payable to his widow for \$10,000, and to each child for \$5,000, which amounts have been paid to them.

At the time of his death the testator was a member of the partnership of Winters & Hardison, dealers in securities and real estate in Nashville; the junior member of the firm being W. F. Hardison. The written articles of partnership provided that the firm should not be dissolved by the death of either party, but that the representatives of the partner dying should designate some one to take the place of the deceased partner, and that the partnership should continue under the firm name until the expiration of the period of five years provided in the articles of partnership. After the death of the testator, his son Jesse T. Winters, who had theretofore been employed by the firm, by the consent of all of the parties interested, was designated to the

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place of the testator, and the partnership has since continued under the firm name.

By item 1 of the will the testator provided for the payment of his debts and funeral expenses, which are shown to have been small. By item 2 he devised his residence to his wife for life, and at her death to his son Jesse T. Winters for life, and at his death to his children. By items 3 and 4 he devised to his other son and daughter each a house and lot for life, and provided that at their death their children should have the lots, respectively.

By the fifth item of his will the testator repeats that the above-mentioned properties, devised to his children, are for their lives, and at their death are to go to their children, and in the event any child shall die without issue the property so devised to such child shall go to the survivors, and at their death to their children.

The sixth item is as follows: "All the rest and residue of my estate of which I shall die seized and possessed, or to which I shall be entitled at the time of my decease, real, personal or mixed, I leave in trust to the firm of Winters & Hardison as trustee for my said wife and three children, share and share alike, the income derived therefrom by said trustees to be paid over to my said wife and children as their necessities may demand, and in the event that their condition is such that it is unnecessary to encroach upon the income therefrom, then I direct that said

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trustees invest the income so as to bring in an income."

The pertinent portions of the remainder of the will are as follows:

"7th. I give and grant unto my executor, Jesse T. Winters full power and authority to sell any and all of the real estate conveyed to me for the firm of Winters & Hardison, . . . and I also authorize and empower and direct my executor to sell any real estate belonging to me individually as my residuary estate but direct that W. F. Hardison act as general manager and adviser of my said executor in disposing of said real estate held by me for said firm of Winters & Hardison, and also the property owned by me individually."

"8th. It is my will and I direct that the firm of Winters & Hardison continue as under the contract of copartnership existing between W. F. Hardison and myself, and that the said W. F. Hardison be general manager of said business."

"Last: I nominate and appoint my son, Jesse T. Winters executor of this my last will and testament, and nominate and appoint W. F. Hardison general manager of the firm of Winters & Hardison, and also general manager of the trust fund left to the firm of Winters & Hardison, trustees, under item 6 of this my will, and also appoint him as advisory trustee and general manager of my residuary estate."

It is contended that the sixth provision of the will creates a perpetuity. The following criticism appears in the brief of counsel for complainants:

“There is no provision in this item under which the grandchildren would come into the estate on the death of the children. There is no time fixed for the termination of the trust, but it is made the duty of the trustees to hold, for all time, the *corpus* of the estate, and if the widow and children do not need the income, then this income is to be invested, becoming a part of the *corpus*. There is no provision that it shall cease on the death of the trustee, and if the trust is valid it will be the duty of a court of equity to appoint a trustee in the place of the dead one so that he could continue the trust. We would thus have certainly the *corpus* of this estate, if not the income, tied up indefinitely.”

The duration of a trust depends upon the purposes of the trust. When the purposes have been accomplished the trust ceases.

In the leading case of *Ellis v. Fisher*, 35 Tenn. (3 Sneed), 231, 65 Am. Dec., 52, this court in an opinion by Judge McKINNEY, in treating of the duration of trusts, said:

“The established doctrine is, that trustees take exactly that quantity of interest which the purposes of the trust require. The question is not, whether the testator has used words of limitation, or expressions adequate to carry an estate of inheritance; but whether the exigencies of the trust demand the

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fee simple or can be satisfied by any, and what less estate. And, therefore, a devise to trustees may be either restricted or extended, as the nature and purposes of the trust require." *Walt v. Walt*, 113 Tenn., 189, 81 S. W., 228; *Dunham v. Harvey*, 111 Tenn., 620, 69 S. W., 772; *Temple v. Ferguson*, 110 Tenn., 84, 72 S. W., 455, 100 Am. St. Rep., 791; *Henson v. Wright*, 88 Tenn., 501, 12 S. W., 1035; *Jourolmon v. Massengill*, 86 Tenn., 81, 5 S. W., 719; *Davis v. Williams*, 85 Tenn., 646, 4 S. W., 8; *Hooberry v. Harding*, 78 Tenn. (10 Lea), 397; *Henderson v. Hill*, 77 Tenn. (9 Lea), 25.

We think this item of the will, considered in connection with the preceding and following provisions, shows the testator purposed three things: First, the conservation of his estate; second, provision for the necessities of his family; and, third, the preservation and investment of the income of the estate beyond the amount necessary to meet the necessities of his wife and children.

Evidently he had the idea that these purposes could better be accomplished by leaving his estate to trustees than by giving it directly to his widow and children. Hardison was his partner and doubtless familiar with his partnership and individual realty, so the testator directs that he should manage the disposition of it. His confidence in the ability of his partner is further proven by making him a trustee and "general manager" of his residuary estate. It is true, the testator devised his property to the

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partnership of Winters & Hardison; however, it is manifest that although the firm was to hold the property in trust, as stated, the management of it was imposed upon Hardison.

The trust will cease as to each *cestui que trust* at death. Each devisee is entitled to receive the portion of the income from his share as his necessities may demand and, of course, the necessities of each end at death. The will does not provide for any devise over of the *residuum* of the estate after the death of the beneficiaries, hence the share of each beneficiary will go at death to his or her devisee, distributee, or heir, as the case may be. *Temple v. Ferguson*, 110 Tenn., 84, 72 S. W., 455, 100 Am. St. Rep., 791; *Ellis v. Fisher*, supra; *Smith v. Metcalf*, 38 Tenn. (1 Head), 64; *Rogers v. White*, 33 Tenn. (1 Sneed), 68.

It is insisted, however, that if the will does not create a perpetuity, the testator died intestate as to the remainder, after vesting a life estate in trustees for complainants, and having both the life estate and remainder, the former became merged in the latter, and therefore the trust fails. The will does not create a life estate in the beneficiaries. The testator devised his property to them, without qualification, except that it is left in equal shares and in trust.

Counsel, however, rely upon *Davis v. Williams*, 85 Tenn., 646, 4 S. W., 8, as authority for their insistence. In that case there was a life estate and

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remainder. However, there can be no merger where an active trust interposes. In the later case of *Henson v. Wright*, 88 Tenn., 501, 12 S. W., 1035, Mr. Justice LURTON, who delivered the opinion of this court in *Davis v. Williams*, said:

“If any trust or duty is imposed on the trustee, either expressly or by implication, the trust is an active one, and in such case there is no merger of the legal and equitable estates”—citing *Henderson v. Hill*, 77 Tenn. (9 Lea), 25, and *Jourolmon v. Massengill*, 86 Tenn., 93, 5 S. W., 719.

• The doctrine of merger will not apply where it defeats the intention of the grantor or testator. Perry on Trusts, section 347; 10 R. C. L., 667; 40 Cyc., 1813.

The judgment of the court of civil appeals is reversed, and a decree will be entered in this court sustaining the trust.

NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY *v.*
SOL V. FORD.

(*Nashville*. December Term, 1917.)

1. **RAILROADS. Injuries to animals. Nature of action.**

Since the statutes do not cover injuries to animals by railroads other than by collision, an action for injuries to mules frightened by a train and injured in a trestle is a common-law action. (*Post*, pp. 292-294.)

Cases cited and approved: *Holder v. Railroad*, 79 Tenn., 176; *Railroad v. Sadler*, 91 Tenn., 508.

2. **RAILROADS. Animals on tracks. Duties of engineer.**

After those in charge of the train observe frightened animals on the track or near by, it is incumbent on them to use ordinary care in operating the train, and if they approach negligently and further frighten the animals and cause injury, the railroad is liable. (*Post*, pp. 294-296.)

Cases cited and approved: *Gay v. Wadley*, 86 Ga., 103; *Brothers v. South Carolina R. Co.*, 5 S. C., 55; *Chicago & N. W. R. Co. v. Taylor*, 8 Ill. App., 108; *Hot Springs R. Co. v. Newman*, 36 Ark., 608; *Pittsburg, C. & St. L. R. Co. v. Stuart*, 71 Ind., 500; *Georgia Pacific R. Co. v. Money*, 8 South., 646; *St. L., I. M. & S. R. Co. v. Bragg*, 66 Ark., 248; *Ramsbottom v. Atlantic Coast Line R. Co.*, 138 N. C., 38; *Ohio Valley R. Co. v. Major*, 12 Ky. Law Rep., 710; *Indianapolis B. & W. R. Co. v. McBrown*, 46 Ind., 229; *Alabama G. S. R. Co. v. Hall*, 133 Ala., 632.

3. **RAILROADS. Animals on track. Negligence. Evidence.**

Evidence held insufficient to show negligence in operation of a train by which mules on the track were frightened and caused to be injured on a trestle. (*Post*, p. 296.)

FROM HICKMAN

Appeal from the Circuit Court of Hickman County
to the Court of Civil Appeals, and by *certiorari* to

the Court of Civil Appeals from the Supreme Court.
—HON. W. B. TURNER, Judge.

CLAUDE WALLER and FITZGERALD HALL, for appellant.

WEBSTER & WEBSTER, for appellee.

MR. JUSTICE GREEN delivered the opinion of the Court.

There was a judgment against the railway company in this case for injuries to certain mules. The court of civil appeals reversed and remanded the case for error in the charge of the trial judge. The railway company has filed a petition for *certiorari*, insisting that it was entitled to a directed verdict.

The mules were not struck by the train, but became frightened thereat and ran into a stock gap or trestle. In cases like this we have no applicable statute. Our statutes respecting the duties of railroad companies concerning stock on their tracks and rendering them liable for injuries to stock under certain circumstances relate alone to injuries caused by collision of the trains with the animals. They do not cover cases where the animals are injured through fright. *Holder v. Railroad*, 79 Tenn. (11 Lea), 176; *Railroad v. Sadler*, 91 Tenn., 508, 19 S. W., 618, 30 Am. St. Rep., 896.

This action, therefore, is one under the common law.

The engineer upon the locomotive frightening the stock testified that he observed seven or eight mules

and a little Shetland pony on the track about a quarter of a mile south of the trestle. He sounded the alarm whistle seven or eight times, and slowed up the speed of his train to about five or six miles an hour. The animals ran up the track. The train never approached them nearer than two hundred yards until after three of the mules had run into the trestle. The pony and the other mules ran off the side of the track into the woods before reaching the trestle. The track was unfenced, and there was no obstruction on either side—nothing to prevent the animals from running off. The train was not brought to a full stop until after the three mules ran into the trestle. It was stopped then, and the trainmen went up to the trestle to get the mules out. Two of them got out unaided, and the trainmen got out the third animal. The engineer testified that he did not chase the mules, and the fireman said that the engineer stopped blowing the whistle when he saw the mules running up the track.

There is nothing in the evidence contrary to the above statement except the testimony of the plaintiff below. He did not witness the accident, but he said that he asked the engineer how it occurred a few days thereafter, and the engineer replied that he ran the mules into the trestle. Of course, the engineer did not mean that he himself ran the mules into the trestle. This is not contended. What he meant was that the train ran them into the trestle. The engineer denies making this statement, and the fireman, who

heard the conversation between the engineer and the plaintiff below, corroborates the engineer. Even if the engineer did say he ran the animals into the trestle, he did not state any of the circumstances nor admit anything indicating an absence of ordinary care on his part in his handling of the train.

After those in charge of a train perceive frightened animals on the track or near by, it is, of course, incumbent upon them to use ordinary care in the movements and conduct of the train. If they negligently operate the train so as to further frighten and cause the animals to injure themselves, the railroad company will be liable for such damage. This principle is well recognized, but, as has been observed, it is somewhat difficult to say just what is negligence under the varying conditions that may arise.

The supreme court of Alabama has said this with reference to the duty of the trainmen to stop:

Where an "animal is on the track frightened, and running under conditions that indicate that, unless the train is stopped, it will run into the trestle, and that the danger may be averted by stopping the train, a duty arises to stop it; and if the engineer negligently fails to do so, the company will be liable." *N., C. & St. L. R. Co. v. Garth*, 179 Ala., 162, 59 South., 640, 46 L. R. A. (N. S.), 430.

The court of civil appeals was of opinion that it was a question for the jury to determine whether under the conditions appearing in this case ordinary

care required that the train should have been stopped.

The decided cases are without exception to the contrary so far as we have been able to ascertain.

Where there is nothing to prevent the animal from leaving the track and the speed of the train is slackened and it is moving slowly, a considerable distance in the animal's rear without unnecessary noise, it has been declared in all the cases that there was no negligence in not bringing the train to a full stop before the animal ran into the trestle. *Gay v. Wadley*, 86 Ga., 103, 12 S. E., 298; *Brothers v. South Carolina R. Co.*, 5 S. C., 55; *Chicago & N. W. R. Co. v. Taylor*, 8 Ill. App., 108; *Hot Springs R. Co. v. Newman*, 36 Ark., 608; *Pittsburg, C. & St. L. R. Co. v. Stuart*, 71 Ind., 500; *Georgia Pacific R. Co. v. Money* (Miss.), 8 South., 646; and other cases collected in note 46 L. R. A. (N. S.), 430.

It is said that under such circumstances the trainmen cannot foresee as a natural or probable consequence of the failure to stop that the animal will run out on the trestle rather than to the side when there is no obstruction. *St. L., I. M. & S. R. Co. v. Bragg*, 66 Ark., 248, 50 S. W., 273; *Ramsbottom v. Atlantic Coast Line R. Co.*, 138 N. C., 38, 50 S. E., 448; *N., C. & St. L. R. Co. v. Garth*, *supra*.

In the case before us the probability that the mules injured would run out to one side of the track was increased by the fact that four other mules in the bunch did so run out, and the engineer had less

reason for apprehending that the injured animals would go on into the trestle.

If an animal is running along a fenced track, through a cut, or on an embankment leading to a trestle or stock gap, the case might be different. Under these conditions the engineer might reasonably anticipate that the animal would run into the trestle, inasmuch as the ways of escape to the sides of the track were not clear. *Ohio Valley R. Co. v. Major*, 12 Ky. Law Rep., 710; *Indianapolis B. & W. R. Co. v. McBrown*, 46 Ind., 229; *Alabama G. S. R. Co. v. Halt*, 133 Ala., 632, 32 South., 259.

There may be other circumstances under which ordinary care would require the engineer to bring his train to a stop. Such circumstances existed in *Davis v. Railroad* (MS. 1912), and in other unreported cases.

There is no conflict in the testimony as to the facts of this accident. The witnesses are all in accord. We are of opinion that the facts disclose no negligence on the part of those in charge of the train of plaintiff in error, and it follows that the judgment of the court of civil appeals and of the circuit court will be reversed, and this suit dismissed.

J. W. HARRISON v. TYLER RASCOE.

(Nashville. December Term, 1917.)

MASTER AND SERVANT. Unlawful employment. Suit for injuries.

Plaintiff, a minor eleven years old, employed by defendant to distribute meats to customers, injured while feeding a sausage mill in defendant's place of business, was within the protection of Thompson's Shannon's Code, section 4342a-44 (Acts 1911, chapter 57, section 1), making it unlawful to employ any child less than fourteen years old "in the distribution or transportation of merchandise."

Acts cited and construed: Acts 1911, ch. 57, sec. 1; Acts 1881, ch. 170; Acts 1893, ch. 159.

Cases cited and approved: *Queen v. Dayton Coal & Iron Co.*, 95 Tenn., 458; *Iron & Wire Co. v. Green*, 108 Tenn., 161; *Finley v. Furniture Co.*, 119 Tenn., 701.

Code cited and construed: Sec. 4342a44 (T-S.).

FROM WILLIAMSON.

Appeal from the Circuit Court of Williamson County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—DOUGLAS WIKLE, Judge.

FAW & CROCKETT, for appellant.

HENDERSON & COURTNEY and GEO. H. ARMSTEAD, JR.,
for appellee.

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MR. JUSTICE FENTRESS delivered the opinion of the Court.

The plaintiff, through his father as next friend, brought this suit to recover damages for alleged personal injuries sustained while in the employment of the defendant. The trial judge sustained a demurrer to the declaration, and the court of civil appeals affirmed his judgment. The petition for *certiorari* was granted by this court, and the case has been argued here.

The action is based on section 1, chapter 57, of the Acts of 1911, Thompson's Shannon's Code, section 4342a44, the applicable portion of which is as follows: "It shall be unlawful for any proprietor, foreman, owner, or other person to employ, permit, or suffer to work any child less than fourteen years of age in, about, or in connection with any mill, factory, workshop, laundry, telegraph or telephone office, or in the distribution or transmission of merchandise or messages."

The declaration avers that plaintiff, while a minor eleven years of age, was employed by the defendant in his place of business, where he sold fresh meats and fish, and manufactured and sold sausage, and, furthermore, that plaintiff was employed in the distribution of meats, etc., to defendant's customers. It is alleged that while feeding a sausage mill, which was propelled by electricity, plaintiff's right hand was caught in the knives, inflicting wounds which necessitated the amputation of three of his fingers.

Counsel stated in the argument that defendant conducted a retail butcher shop, and that the duties of the boy were to deliver meat and, while not so engaged, to work in the shop.

The court of civil appeals was of the opinion that the case did not come within the purview of the act.

While we express no opinion as to whether such a business may come within the meaning of the words "mill, factory, or workshop," as used in the statute, we think the plaintiff was employed in the distribution of merchandise, and therefore was within the protection of the statute.

In *Queen v. Dayton Coal & Iron Co.*, 95 Tenn., 458, 32 S. W., 460, 30 L. R. A., 82, 49 Am. St. Rep., 935, this court held that the employment of a boy under twelve years of age in a mine, in violation of chapter 170 of the Acts of 1881, rendered the employer liable for any injury that might be sustained by the boy in the course of his employment.

In *Iron & Wire Co. v. Green*, 108 Tenn., 161, 65 S. W., 399, it was held that the employment of an infant, less than twelve years of age, in a factory, in violation of Acts 1893, chapter 159, rendered the employer liable for all injuries sustained by the infant, even though the child was injured while not actually performing any duty for which he was employed. In that case, according to the defendant's view of the facts, the boy was employed to work in the factory, and voluntarily left his work, and, as

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he passed through the factory yard, turned aside to play with some panels stacked against a post, causing them to fall and injure him. The court held that, notwithstanding the boy's negligence, there was a causal connection between the wrongful employment and the injury, and therefore the master was liable. In speaking of that act, which has been amplified in the present act and impliedly repealed by the latter, this court said:

"The statute in question, like that involved in *Queen v. Dayton Coal & Iron Company*, was wisely adopted by the legislature with the view of keeping children out of employment where the services incident thereto were likely to be too heavy a task for their immature strength, or might be rendered in places and about machinery, which, because of their inexperience and thoughtlessness, would be constantly fraught with danger to them."

In *Finley v. Furniture Co.*, 119 Tenn., 701, 109 S. W., 504, in speaking of a declaration in a suit in which a boy sued for damages for personal injuries sustained while employed in a factory, it was held the declaration "would have supported the action, without more, had it proved to be a fact that he was in the service of this corporation, hurt in that service, and under fourteen years of age."

The judgment of the court of civil appeals is reversed, and the case will be remanded.

JERNIGAN BROS. *et al.* v. LEN K. HART.

(*Nashville*. December Term, 1917.)

ATTORNEY AND CLIENT. Lien for services. Waiver.

Where an attorney, otherwise entitled to a charging lien on a judgment recovered, takes an assignment to himself of the entire judgment, he abandons or waives his right to enforce the lien; the claim to a lien being merged in the specific assignment of the whole judgment.

Cases cited and approved: *Dodd v. Brott*, 1 Minn., 270; *Fulton v. Harrington*, 7 Houst. (Del.), 182; *McDonogh v. Sherman*, 138 App. Div., 291; *Whitehead v. Jessup*, 7 Colo. App., 460.

FROM PUTNAM.

Appeal from the Chancery Court of Putnam, County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—A. H. ROBERTS, Chancellor.

WORTH BRYANT, ALGOOD & FINLEY, O. K. HOLLADAY and B. G. ADCOCK, for plaintiffs.

NATHAN COHN and FRANK BOYD, for defendant.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

Where an attorney, otherwise entitled to a charging lien on a judgment recovered, takes an assignment to himself of the entire judgment, is his right to enforce the lien abandoned or waived? Yes.

Principle: Where the assignment is not of a part or certain amount of the judgment, representing and securing his lien claim, and is not one of the entire judgment as security merely for the payment of his fees, the assignment, transferring absolute ownership of the judgment, operates as a waiver of equities he might have been entitled to by way of the declaration of an attorney's lien. The lesser claim to a lien on the judgment for services is merged in the specific contract assigning the whole judgment. There cannot exist a lien in favor of a person against property title to which is vested in himself.

Precedent: It was so held in *Dodd v. Brott*, 1 Minn., 270 (Gil., 205) 66 Am. Dec., 541; *Fulton v. Harrington*, 7 Houst. (Del.), 182, 30 Atl., 856; *McDonogh v. Sherman*, 138 App. Div., 291, 122 N. Y. Supp., 1033; *Whitehead v. Jessup*, 7 Colo. App., 460, 43 Pac., 1042; 2 R. C. L., p. 1064.

Writ of *certiorari* is granted, and the ruling of the court of civil appeals on this point is reversed, and the decree of the chancellor affirmed in all respects.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
WESTERN DIVISION

JACKSON, APRIL TERM, 1918.

ROBERT & ADELINE KILGROW *et ux* v. MARY B. WEST
et al.

(*Jackson*. April Term, 1918.)

INJUNCTION. Acts of juvenile court officers.

A court of equity has no jurisdiction to restrain officers of a juvenile court established under Acts 1911, chapter 58, from carrying out a threat to make a child a ward of the court, whether the proceeding is civil, criminal, or semicriminal, because the juvenile court is one of record, and no property rights are involved, and if the juvenile court will not do justice, there is a remedy by appeal.

Acts cited and construed: Acts 1911, ch. 58.

Cases cited and approved: *Hawkins v. Kercheval*, 78 Tenn., 535; *Delaney v. Flood*, 183 N. Y., 323; *The Sailors v. Woelfle*, 118 Tenn., 755.

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FROM SHELBY.

Appeal from the Chancery Court of Shelby County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—FRANCIS FENTRESS, Chancellor.

L. H. GRAVES, for complainants.

JULIAN G. STRAUSS, for defendants.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

The bill of complaint was filed by Kilgrow and wife seeking to restrain the officers and agents of the juvenile court of the city of Memphis from carrying out certain threats claimed to have been made by said officials to take from complainants their thirteen year old daughter and detain her as a ward of that court, unless complainants should move from their residence, the location of which was declared to be undesirable by the defendant officials.

The defendants interposed a motion to dismiss the bill, assigning as grounds the lack of jurisdiction in the chancery court to entertain it. The chancellor was of opinion that he was without jurisdiction, and sustained defendants' motion and dismissed the bill, from which action there was an appeal to the court of civil

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appeals where the decree of the chancellor was reversed and the injunction decreed to issue.

The allegations of the bill, in substance, are as follows: Robert Kilgrow and his wife, Adeline Kilgrow, elderly persons, have resided in Memphis for about fifty years, living at the date the suit was brought with their daughter, Ruth, at No. 22 Nettleton street. They have lived there continuously for more than five years, renting the property from the Illinois Central Railroad Company, from whom they have leased the premises for life at a small monthly rental. The location of their home is in a respectable neighborhood, far removed from anything evil or immoral. There they lived contented until about four weeks prior to the filing of the bill, when a juvenile court officer appeared at their home and informed complainants that they (the defendants) did not like the location of complainants' home, and notified them that unless they immediately removed their place of abode that they would take from them their daughter, and keep her as a ward of the court. This action was threatened, notwithstanding the location of the home was proper, and that the juvenile court had no complaint to make as to either the dependency or delinquency of the child.

Complainant, Adeline Kilgrow fearing that the juvenile court would carry out its threats and yielding to the fears of her little daughter, rented a room about a block away from their home, and dwelt there alone with her child while complainant, Robert Kilgrow, remained at the home on Nettleton street alone to safe-

guard the property. This mode of living being unbearable and desiring to return to her home and her husband, and fearing that if she did the juvenile court would carry out its threats, complainant sought to enjoin the defendants from compelling them to move and from taking away from them their child.

We are of opinion that the chancellor held and enforced the correct view, and that the decree of the court of civil appeals to the contrary is erroneous.

The defendants are proceeded against as officers of the juvenile court, which was established by and is operating under the provisions of Acts 1911, chapter 58. That court is one of record and its officers will not be interfered with by a court of equity by means of injunctive process sued out for the purpose of controlling their actions, where it appears, as in the present case, that no property rights are involved or directly affected. *Hawkins v. Kercheval*, 10 Lea (78 Tenn.), 535, 540, and authorities cited; *Delaney v. Flood*, 183 N. Y., 323, 76 N. E., 209, 2 L. R. A. (N. S.), 678, 111 Am. St. Rep., 759, 5 Ann. Cas., 480.

In substance the chancery court was asked to stay the hands of the juvenile court, and to determine the illegality of the action sought to be taken by officers of the latter tribunal. We think that on the face of the bill of complaint the illegality of the steps threatened may be assumed; that it is, is not even controverted by the defendants. Their insistence is that the jurisdiction to so determine and declare is with the juvenile court, and not the chancery court.

The court of civil appeals made the question of jurisdiction of the chancery court to turn upon the point that such a proceeding in the juvenile court is (as it conceives) civil and not criminal in nature. Regardless of the nature of such a proceeding, whether it be purely civil, or semicriminal in certain aspects, we think the governing principle is, that the province of equity is not to usurp the functions of a court of law in such a case. The illegality of the course sought to be taken by the defendants would have been disclosed and, we must assume, frustrated in the juvenile court. The presumption that that court would give a fair hearing in the case and decide justly is equally as strong as the presumption that a court of equity would do so. The chancery court should not be burdened with the consideration and disposition of such cases by a resort to the injunctive process of that court. No grounds for equitable relief in the proper sense are presented. *The Sailors v. Woelfle* 118 Tenn., 775, 102 S. W., 1109, 12 L. R. A. (N. S.), 881; 22 Cyc., 880.

Should the complainants or their child fail to get justice in the juvenile court, they have a right to have the judgment of that court reviewed in the circuit court by proper procedure to that end; thence an appeal may be prosecuted to the appellate courts.

Writ of *certiorari* granted; the decree of the court of civil appeals reversed, and that of the chancellor affirmed.

STATE *ex rel.* JONES *et al.* v. WEST, SUPERINTENDENT
OF JUVENILE COURT, *et al.*

(Jackson. April Term, 1918.)

1. **HABEAS CORPUS.** Custody of child. Juvenile court judgment.

Under Thompson's Shannon's Code, section 5503, giving authority to any judge of the circuit, common-law, or criminal courts, or to any chancellor to issue a writ of *habeas corpus*, where the juvenile court, in a proceeding under Acts 1911, chapter 58, entered a judgment awarding custody of a child, the questions determined in such proceeding cannot be again litigated in a *habeas corpus* proceeding, by the same parties, on the same state of facts. (*Post*, pp. 528-530.)

Acts cited and construed: Acts 1911, ch. 58.

Cases cited and approved: State ex rel. v. Paine, 23 Tenn., 523; In re Barry (C. C.), 42 Fed., 113; In re Burrus, 136 U. S., 586; New York Foundling Hospital v. Gatti, 203 U. S. 429; People v. Chegaray, 18 Wend. (N. Y.), 637; United States v. Green, 3 Mason, 482; Ewell v. Sneed, 136 Tenn., 602; Mormon Church Case, 136 U. S., 1; State ex rel. v. Kilvington, 100 Tenn., 227; Childress v. State, 133 Tenn., 121; Gudger v. Barnes, 51 Tenn., 571; State v. Bank, 95 Tenn., 212; Farnham v. Pierce, 141 Mass., 203; Kennedy v. Meara, 127 Ga., 68.

Case cited and distinguished: Ex parte Watkins, 3 Pet., 193.

Code cited and construed: Sec. 5503 (T.-S.). Constitution cited and construed: Art. 1, sec. 15 (1870); Art. 1, sec. 15 (1834); Art. 11, sec. 15 (1796).

2. **HABEAS CORPUS.** Purpose of writ.

The writ of *habeas corpus* cannot be made to serve the purpose of an appeal or writ of error. (*Post*, pp. 530, 531.)

State ex rel. v. West.

3. CERTIORARI. Review of proceedings in juvenile court.

Proceedings in the juvenile court must be reviewed in the circuit court by *certiorari*. (*Post*, p. 531.)

Cases cited and approved: State ex rel. v. Taxing District, 84 Tenn., 240; State v. Bockman, 201 S. W., 741.

FROM SHELBY.

Appeal from the Circuit Court of Shelby County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—
BEN L. CAPELL, Judge.

L. H. GRAVES, for plaintiffs.

JULIAN G. STRAUSS, for defendants.

MR. JUSTICE GREEN delivered the opinion of the Court.

This is a *habeas corpus* proceeding, brought by Chester R. Jones against the officers of the juvenile court in Memphis to obtain the custody of his minor child, Chester R. Jones, Jr.

Two or three days before this petition was filed, certain proceedings were had in the juvenile court in Memphis to which Chester R. Jones was a party, and it was there adjudged that the best interests of the child required that its custody be intrusted to a woman in Memphis, formerly a nurse. An order to this effect was accordingly entered, and in other pro-

ceedings had in the juvenile court the father, Chester R. Jones, was directed to contribute a certain weekly sum toward the care and maintenance of the child.

The pleadings in the *habeas corpus* case are not sent up with the transcript, but no point is made on that by either party. The only question discussed is the power of the criminal or law courts in Tennessee to try over the question of the custody of a minor child and determine what the child's best interests require, regardless of the action of the juvenile court in the premises, and in a different suit.

It is not denied that the proceedings with reference to this child were regular, and that the juvenile court had jurisdiction of the subject-matter under the act of 1911, nor is it insisted that the facts developed on the hearing of the petition for *habeas corpus* were at all different from the facts presented to the juvenile court. As noted above, only two or three days intervened between the two hearings.

Although the circuit judge allowed the parties to go into full proof tending to show what the best interests of the child required, he finally concluded that the writ of *habeas corpus* did not lie in such a case under such circumstances, and dismissed the petition. On appeal by the relator, this judgment was reversed by the court of civil appeals, and the child was awarded to his grandfather, the father of the relator Chester R. Jones. The authorities of the juvenile court have filed a petition for *certiorari*, which has been granted by this court, and the case heard here.

We are of opinion that the circuit judge properly dismissed the petition for *habeas corpus* and discharged the writ.

The disposition of the case submitted necessarily involves a consideration of the function of the writ of *habeas corpus* as employed affecting the custody of minor children.

Such use of the writ has been recognized in Tennessee from an early date, and there is a full discussion of the subject in *State ex rel. v. Paine*, 23 Tenn. (4 Humph.), 523.

In the United States circuit court for the Southern District of New York, Judge BETTS delivered an opinion in the case of *In re Barry* (C. C.), 42 Fed., 113. This opinion is a classic in the law, and was ordered by the supreme court to be printed as an appendix to its own opinion in *Re Burrus*, 136 U. S., 586, 10 Sup. Ct., 850, 34 L. Ed., 500, and was again commended and referred to in *New York Foundling Hospital v. Gatti*, 203 U. S., 429, 27 Sup. Ct., 53, 51 L. Ed., 254.

The learned judge in this discussion showed that *habeas corpus* was purely a prerogative writ. It issued to bring the parties imprisoned before the king in person, or some magistrate or other representative of the supreme authority. If there appeared to be no due cause for the detention of the petitioner, the sovereign set him free—citing 3 Blackstone, Com., 131; Bacon's Abr. (Habeas Corpus) 421; 3 Story's Constitutional Law, 207; 2 Kent's Com., 26, 29; *Ex parte Watkins*, 3 Pet., 193, 202, 7 L. Ed., 650.

"In respect to married women or other adults, held in detention by private individuals, the sovereign, through this writ, acts as *conservator pacis* and *custos morum*, and in regard to infant children, as *parens patriae*, making, in these high capacities, summary order that the party be forthwith set at liberty, if improperly and wrongfully detained. Lofft, 748, and 13 Johns. [N. Y.], 418, above cited; *People v. Chegaray*, 18 Wend. [N. Y.], 637; 8 Paige, 47, above cited; *United States v. Green* [Fed. Cas. No. 15,256], 3 Mason, 482. The State, thus acting upon the assumption that its parentage supersedes all authority conferred by birth on the natural parents, takes upon itself the power and right to dispose of the custody of children, as it shall judge best for their welfare. *People v. Chegaray*, 18 Wend. [N. Y.], 642, 643; *Blisset's Case*, Lofft, 748.

"The cases before cited show that the English and American courts act in this behalf solely upon the assertion of the right of the sovereign whose power they administer, to continue or change the custody of the child at his discretion, as *parens patriae*, allowing the infant, if of competent age, to elect for himself; if not, making the election for him." *In re Burrus*, supra.

Under the change of government from a monarchy to a republic, the functions of *parens patriae* did not cease to exist. Such authority passed from the king to the government of the State or sovereign people, and it may be called into exercise by the legislature, the

representatives of the people, and delegated by the legislature to other functionaries. *Ewell v. Sneed*, 136 Tenn., 602, 624, 191 S. W., 131; *Morman Church Case*, 136 U. S., 1, 58, 10 Sup. Ct., 792, 34 L. Ed., 481, 496.

In *Ewell v. Sneed*, supra, following our earlier cases, we pointed out that at the time of the decision no officer in Tennessee had been intrusted with authority and duties of *parens patriae* respecting charities. This is what the charity cases mean when they say we have no *parens patriae*.

The writ of *habeas corpus*, however, was preserved as a part of our system of government by the federal Constitution (article 1, section 9), and by each Constitution of the State (1870, article 1, section 15; 1834, article 1, section 15; 1796, article 11, section 15.)

Authority to issue this writ is intrusted by statute to any judge of the circuit, common-law, or criminal courts, or to any chancellor in cases of equitable cognizance. Thompson's Shannon's Code, section 5503.

As it affects the custody of infants, the writ of *habeas corpus* rests on the assumption of a right in the State, paramount to any parental or other claim, to dispose of such children as their best interests require. The legal rights of a parent are very gravely considered, but are not enforced to the disadvantage of the child. Such is the universal practice, and it has been followed in this jurisdiction from *State ex*

rel. v. Paine, supra, to *State ex rel. v. Kilvington*, 100 Tenn., 227, 45 S. W., 433, 41 L. R. A., 284.

There is no reason to doubt that this sovereign power of the State to foster the welfare of the child may be exercised through other instrumentalities than the writ of *habeas corpus*, and may be enforced by agencies other than courts of law and equity.

In solicitude of this class of the population of the State, the legislature has created the juvenile courts by chapter 58 of the Acts of 1911, the validity of which enactment we upheld in *Childress v. State*, 133 Tenn., 121, 179 S. W., 643. These courts were established for the protection of our children, and are expressly authorized to remove delinquent or dependent children from unfavorable surroundings and adjudicate their proper custody, and separate them from their parents when such action appears to be for the best interests of the child. The jurisdiction conferred on these tribunals in such matters is ample.

Now, as we have said, the real office of the writ of *habeas corpus* in cases involving the custody of children is to develop before the court what the true interests of the detained child require, and an order is made accordingly.

This is the exact question which is presented to the juvenile court in all these cases intrusted to its jurisdiction.

An adjudication in one *habeas corpus* proceeding to determine the custody of a child is almost uniformly held to be conclusive on the parties, or *res adjudi-*

cata in a similar proceeding on the same state of facts. 21 Cyc., 351; 12 R. C. L., p. 1255.

We think that an adjudication of such a matter in the juvenile court is likewise conclusive on the parties on the same state of facts.

It is of course elementary that a judgment or decree in one suit is a bar to another suit between the same parties for the same object and purpose; the same point being directly in issue. Our cases to this effect will be found collected in 6 Enc. Dig. of Tenn. Rep., p. 193.

As a matter of fact, a judgment of a court of competent jurisdiction, upon a point or question directly involved, is conclusive in a second suit between the same parties, although the subject-matter of the second action be different. *Gudger v. Barnes*, 51 Tenn. 4 Heisk), 571; *State v. Bank*, 95 Tenn., 212, 31 S. W., 989.

It is said that the best test as to whether a former judgment is a bar in subsequent proceedings is to consider whether the same evidence would sustain both. If so, then the judgment in the former suit is *res adjudicata*, although the two actions are different. 15 R. C. L., p. 964.

Tested by this rule, the judgment in the juvenile court was clearly a bar to this proceeding in *habeas corpus*. It makes no difference that the form of action was different.

“On the question of *res judicata*, it is immaterial that the questions alleged to have been settled by a

former adjudication were determined in a different kind of proceedings or a different form of action from that in which the estoppel is set up, the parties and the issues being the same." 23 Cyc., 1221.

We do not mean to say that a writ of *habeas corpus* will not lie, as affecting the custody of children determined by the juvenile court, in any case. If some time has elapsed since the order of the juvenile court in such a matter, or if the conditions of the parents or former custodian of the child has changed, so as to make it desirable that the child be returned to them, such matters can be properly set up, and the child recovered by *habeas corpus* procedure. To this effect see *Farnham v. Pierce*, 141 Mass., 203, 6 N. E., 830, 55 Am. Rep., 452; *Kennedy v. Meara*, 127 Ga., 68, 56 S. E., 243, 9 Ann. Cas., 396.

This is what this court held in *State v. Kilvington*, *supra*.

We are of opinion, however, that such a question, determined by the juvenile court, cannot be again litigated in a *habeas corpus* proceeding, in the courts of law and criminal courts, between the same parties, and on the same state of facts. The jurisdiction of the juvenile court, as stated before, is adequate, and its valid judgments are entitled to full consideration.

The writ of *habeas corpus* cannot be made to serve the purpose of an appeal or writ of error. *State ex rel. v. Taxing District*, 16 Lea (84 Tenn.), 240. Proceedings in the juvenile court must be reviewed in the

circuit court by *certiorari*, as pointed out in *State v. Bockman*, 201 S. W., 741, just decided.

It results that the judgment of the court of civil appeals will be reversed, and the judgment of the circuit court affirmed, and this petition will be dismissed, and the writ of *habeas corpus* discharged.

C. R. BERRY v. SHELBY COUNTY *et al.*

(Jackson. April Term, 1918.)

1. COUNTIES. Bonds. Validity.

Priv. Acts 1917, chapters 295, 479, authorizing Shelby county to aid Bolton College by issuing bonds and levying a tax to pay therefor, violates Constitution 1870, article 2, section 29, providing that a county's credit shall not be given in aid of any person, etc., unless such action be authorized by a three-fourths vote at an election held for that purpose. (*Post*, pp. 538-542.)

Acts cited and construed: Priv. Acts 1917, chs. 295, 479.

Cases cited and approved: *Nichol v. Nashville*, 28 Tenn., 252; *L. & N. R. R. Co. v. Davidson County*, 33 Tenn., 637; *Winston v. T. & P. R. R. Co.*, 60 Tenn., 60; *Lauderdale County v. Fargason*, 75 Tenn., 155; *City of Memphis v. Gayoso Gas Co.*, 56 Tenn., 531; *University v. Knoxville*, 65 Tenn., 166; *Luehrman v. Taxing District*, 70 Tenn., 425; *Williams v. Taxing District*, 84 Tenn., 531; *Demoville v. Davidson County*, 87 Tenn., 214; *State ex rel. v. Cummings*, 130 Tenn., 566; *Quinn v. Hester*, 135 Tenn., 373; *Waterhouse v. Board*, 55 Tenn., 857; *Ballentine v. Mayor*, 83 Tenn., 633; *Smith v. Carter*, 131 Tenn., 1; *Wallace v. Tipton Co.*, 3 Shan. Cas., 542; *Winston v. Railroad*, 60 Tenn., 60; *McCallie v. Chattanooga*, 40 Tenn., 317; *Shelby County v. Judges*, 3 Shan. Cas., 508; *Shelby County v. Exposition Co.*, 96 Tenn., 659; *Burnett v. Maloney*, 97 Tenn., 697; *State ex rel. v. Powers*, 124 Tenn., 553; *In re Forked Deer Drainage District*, 133 Tenn., 684; *State ex rel. v. Brown*, 132 Tenn., 685; *Ransom v. Rutherford Co.*, 123 Tenn., 25; *Shelby County v. Jarnigan*, 3 Shan. Cas., 184; *Wallace v. County Court*, 3 Shan. Cas., 542; *University v. Knoxville*, 65 Tenn., 166; *City of Memphis v. Memphis Gayoso Gas Co.*, 56 Tenn., 531; *Newman v. Ashe*, 68 Tenn., 380; *Ballentine v. Pulaski*, 83 Tenn., 644; *Imboden v. City of Bristol*, 132 Tenn., 562.

Constitution cited and construed: Sec. 29, art. 2.

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2. MUNICIPAL CORPORATIONS. Bond issues. Validity.

Under Constitution 1870, article 2, section 29, providing that the legislature may authorize municipalities to tax for county and corporate purposes in such manner as shall be prescribed by law, but that a municipality's credit shall not be pledged in aid of any person, etc., unless such action be authorized at an election, no election is necessary where the municipality directly taxes for a direct public purpose unless the statute specifically so requires. (*Post*, pp. 543, 544.)

Case cited and approved: *Colburne v. Railroad*, 94 Tenn., 43.

3. MUNICIPAL CORPORATIONS. Bond issues. Validity.

Under Constitution 1870, article 2, section 29, providing that a municipality's credit shall not be given or loaned unless such action be approved at an election, the statute authorizing the loan of credit must provide for the election. (*Post*, pp. 544-546.)

FROM SHELBY.

Appeal from the Chancery Court of Shelby County.
—F. H. HEISKELL, Chancellor.

R. LEE BARTELS, for appellant.

CARUTHERS EWING, for appellees.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

The bill was filed by a taxpayer of Shelby county, in behalf of himself and all other taxpayers to have declared void \$150,000 of bonds which the county was about to issue, under chapters 295 and 479 of the so-

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called Private Acts of 1917, and certain orders of the county court based on these two acts. The ground of attack is that the bonds were to be issued in aid of Bolton College without the submission of the proposition to the people of Shelby county for a vote thereon, pursuant to the second paragraph of section 29 of article 2 of the Constitution of 1870. The chancellor dismissed the bill, and the complainant has appealed. On application the cause was advanced for hearing at the present term as being a matter of public interest.

Chapter 295 is entitled: "An act to authorize Shelby county to aid Bolton College by the issuance of \$150,000 in bonds, to levy a tax for the benefit of said school, and to secure the payment of the bonds and the interest thereon."

The act recited in its first section that its purpose was to raise means necessary to erect buildings upon the property of Bolton College, and to purchase necessary equipment therefor. It further provided that Bolton College should execute a trust deed on all its real estate, together with improvements thereon, and that this trust deed was to secure the payment of these bonds to be issued by Shelby county; that the bonds and coupons should not create any general liability against Shelby county, but the holders should look solely to the security of the trust deed. The next section gave to Shelby county the right to levy a special Bolton College tax annually so long as the bonds should remain outstanding, and provided that

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the sum so realized should be expended solely for the purpose of paying interest upon the bonds and to create a sinking fund, "and for the purpose of aiding and keeping up Bolton College as an institution of learning for which it is designed." The third section provided that the proceeds derived from the sale of the bonds should be turned over to the trustees of Bolton College to be expended by them solely for the erection of proper and necessary buildings upon the real estate of the college. This section also provided that the proceeds of the annual tax authorized to be levied should be paid over to the trustees of the college to be administered by them for the benefit thereof.

Chapter 479 amended section 2 of the act just referred to by adding at the end of that section the following:

"Provided, that in case Shelby county shall issue said bonds, then it shall be the duty of the county to levy a sufficient tax each year to provide for the payment of the interest on the bonds, and to provide a sinking fund, so long as any of said bonds are outstanding, and this duty is made mandatory on the county."

Pursuant to these two acts the county court of Shelby county entered upon its minutes certain orders directing that \$150,000 of bonds should be executed by the county in aid of Bolton College, and should be sold and the proceeds turned over to the trustees of the college. Accordingly the bonds were prepared and a

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bid was obtained upon them, which the county deemed satisfactory. At this point the bill was filed enjoining the issuance of the bonds.

Neither the original act nor the amended act provided for a submission of the proposition to a vote of the people.

Bolton College is an institution of learning arising out of the will of Wade Bolton. He died about the year 1869, and left three hundred acres of land and a considerable sum of money for the erection and financing of an institution of learning for the benefit of the poor and orphan white children of the First civil district of Shelby county. In the course of time the management of the trust fell into the hands of the chancery court of Shelby county, where it has rested for many years. Buildings have been erected upon the property, and a school has been conducted there for a long time. The chancellor directed that the charity be incorporated, and this was done, but the trustees of that date are all dead, and it does not appear that the corporate functions have since been used, the school acting, as stated, practically always under the direction of the chancellor.

About the year 1910 the board of education of Shelby county began to take an interest in the college. Through the efforts of that body an agricultural school was established at Bolton College, and the county aided it for a term of two years by a tax of one cent on each \$100 of all the taxable wealth of Shelby county. This was continued for another two

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years, and is still in existence, having been renewed from time to time for two-year terms. Later a plan was developed between the trustees of Bolton College and the board of education of Shelby county whereby a grammar school was established at the college covering the first seven grades of the common school curriculum of Shelby county. This school is under the sole control of the authorities of Bolton College. They select the teachers and conduct the school, but under the agreement these teachers are required to attend regular institutes that the public school teachers of the county attend, and they are required to be approved by the superintendent of public instruction of Shelby county. In addition the board of education of Shelby county contributes liberally to the salaries of the teachers. It was part of the agreement, however, that the arrangement could be terminated by either side on six months' notice. This was the *status* of affairs when the plan was developed for issuing the bonds to enlarge the usefulness of Bolton College. Dormitories were needed, it was believed, in order to accommodate the increased attendance that was expected. We do not doubt that the trustees of Bolton College, the county court, and the board of education of Shelby county were all actuated by a high purpose. They all believed that this fund of \$150,000 was needed to raise Bolton College to the position wherein it would be most serviceable to the cause of education. No one can doubt the high public spirit which prompted the enterprise,

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but beyond doubt we are bound to decide against it on constitutional grounds.

We are of the opinion that the two legislative acts referred to are void, because they are in violation of the second paragraph of article 2, section 29, of our Constitution of 1870, since they attempt to authorize one of the counties of this State without a preliminary popular election to lend its aid to an entity distinct from itself, by the issuance of bonds to be paid by taxes assessed upon, and collected from, the property of the citizens of the county. The result is the same whether Bolton College be regarded as a corporation, or simply as a charitable organization represented by trustees acting at all times under the direction of the chancery court of the county.

The section of the Constitution referred to reads: "Sec. 29. The General Assembly shall have power to authorize the several counties and incorporated towns in this State, to impose taxes for county and corporation purposes respectively, in such manner as shall be prescribed by law; and all property shall be taxed according to its value, upon the principles established in regard to State taxation.

"But the credit of no county, city or town shall be given or loaned to or in aid of any person, company, association or corporation, except upon an election to be first held by the qualified voters of such county, city or town, and the assent of three-fourths of the votes cast at said election. Nor shall any county,

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city or town, become a stockholder with others in any company, association or corporation except upon a like election, and the assent of a like majority."

The first paragraph was the same in the Constitution of 1834. The second originated with the Constitution of 1870.

Many of our cases on the general subject were either decided before the adoption of the Constitution of 1870 or, if decided afterwards, were based upon facts arising before that time, and so were decided under the Constitution of 1834, that is, under the first paragraph quoted supra. Among these cases are the following: *Nichol v. Nashville*, 9 Humph. (28 Tenn.), 252; *L. & N. R. R. Co. v. Davidson County*, 1 Sneed (33 Tenn.), 637, 62 Am. Dec., 424; *Winston v. T. & P. R. R. Co.*, 1 Baxt. (60 Tenn.), 60; *Lauderdale County v. Fargason*, 7 Lea (75 Tenn.), 155; *City of Memphis v. Gayoso Gas Co.*, 9 Heisk. (56 Tenn.), 531; *University v. Knoxville*, 6 Baxt. (65 Tenn.), 166. In applying these cases it is important to bear this fact in mind, so that we may not confuse the act of 1852 carried into the Code of 1858, providing a method by which the popular will might be ascertained on a proposition for granting aid by a subscription to stock, or in other forms, with the positive requirement of the Constitution of 1870 that a popular vote of approval shall be essential to the loan or other aid granted to a corporation, company, association, or other person. The propriety of this suggestion is illustrated by the case of *Lauderdale Co. v. Fargason*, supra, wherein it

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was held that, notwithstanding the act of 1852 the legislature might authorize a county to lend its aid to a railway corporation without a submission of the matter to a vote of the people. The same rule was applied, although not expressly referred to, in *City of Memphis v. Gas Co.*, supra. After the adoption of the Constitution of 1870 this could not be done.

So it is that, although the legislature may itself, without the intervention of county or municipal authorities, levy taxes directly for the support of such county or municipal corporation (*Luehrman v. Taxing District*, 2 Lea [70 Tenn.], 425, 441-445; *Williams v. Taxing District*, 16 Lea [84 Tenn.], 531, 536, 538; *Demoville v. Davidson County*, 3 Pickle [87 Tenn.], 214, 224, 10 S. W., 353; *State ex rel. v. Cummings*, 3 Thompson [130 Tenn.], 566, 569, 573, 172 S. W., 290, L. R. A., 1915D, 274; *Quinn v. Hester*, 135 Tenn., 373, 186 S. W., 459), yet it cannot authorize such county or municipal corporation, and to these only can it delegate the taxing power (*Waterhouse v. Board*, 8 Heisk. [55 Tenn.], 857; *Ballentine v. Mayor*, 15 Lea [83 Tenn.], 633, 639; *Luehrman v. Taxing District*, supra; *Smith v. Carter*, 131 Tenn., 1, 7, 173 S. W., 430), to lend its aid by taxation to any corporation, company, association, or person, or to subscribe for stock in or with any such body or person, unless it also authorizes the submission of the matter to a vote of the people, and unless such vote be had approving by a three-fourths majority such lending of aid or subscription for stock, thus complying with the act author-

izing the election (*Railroad v. Davidson Co.*, supra; *Wallace v. Tipton Co.*, 3 Shan. Cas., 542, 552; *Winston v. Railroad*, 1 Baxt. [60 Tenn.], 60, 76).

Furthermore, such lending of aid or subscription of stock must be for a county or corporation purpose, under the express terms of the constitutional provision quoted; and Mr. Justice TURLEY, in *Nichol v. Nashville*, supra, suggested that this would be true even without a formal requirement of the Constitution. However, such is the positive requirement.

As to what is a county or corporation purpose our cases declare that this is incapable of an exact and all-inclusive definition, and that each case must turn on its own facts. *Nichol v. Nashville*, supra; *McCallie v. Chattanooga*, 3 Head (40 Tenn.), 317, 321; *Shelby County v. Judges*, 3 Shan. Cas., 508, 512, 513, 518, 521, 522; *Shelby County v. Exposition Co.*, 12 Pickle (96 Tenn.), 659, 36 S. W., 694, 33 L. R. A., 717. Some illustrations from our cases will indicate the general views of the court on the subject: A county bridge is a county purpose, *Burnett v. Maloney*, 13 Pickle (97 Tenn.), 697, 37 S. W., 689, 34 L. R. A., 541; an exhibit of the county's resources at an exhibition of the resources of the State, *Shelby County v. Exposition Co.*, 12 Pickle (96 Tenn.), 653, 659-661, 36 S. W., 694, 33 L. R. A., 717; a drainage district, *State ex rel. v. Powers*, 16 Cates (124 Tenn.), 553, 137 S. W., 1110; *In re Forked Deer Drainage District*, 133 Tenn., 684, 182 S. W., 237; juvenile courts, *State ex rel. v. Brown*, 132 Tenn., 685, 690, 179 S. W., 321; public

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schools, *Ransom v. Rutherford Co.*, 15 Cates (123 Tenn.), 25, 30, 31, 130 S. W., 1057, Ann. Cas., 1912B, 1356; the construction of a railroad into a county, *Railroad v. Davidson County*, supra; *Shelby County v. Jarnigan*, 3 Shan. Cas., 184; *Wallace v. County Court*, 3 Shan. Cas., 542; *Winston v. Railroad*, supra.

Each one of the following has been approved as a municipal corporation purpose: A public library, *University v. Knoxville*, 6 Baxt. (65 Tenn.), 166; subscription for the lighting of the city, *City of Memphis v. Memphis Gayoso Gas Co.*, 9 Heisk. (56 Tenn.), 531; waterworks, *Newman v. Ashe*, 9 Baxt. (68 Tenn.), 380, 381-383; public schools, *Ballentine v. Pulaski*, 15 Lea (83 Tenn.), 644; the improvement of the streets of a city, *Imboden v. City of Bristol*, 132 Tenn., 562, 179 S. W., 147; the building of a railroad into or near a city, *Nichol v. Nashville*, supra; *McCallie v. Chattanooga*, supra.

The cases illustrating a county purpose and those illustrating a municipal corporation purpose are mutually helpful.

It is perceived that some of the purposes are direct; as public bridges, public schools, waterworks, gas-works, and some others catalogued in the list just given, whilst others, as the construction of a railroad into a county, or into or near a city, are indirect. The former promote directly the welfare of the county or city, while the latter effect this result only in an incidental way, in the increase of the value of lands, the improvement of trade and commerce, and the like.

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Where the purpose is direct, and is accomplished by direct action of the county or city, as in building, or employing others to build for it, the county's bridge, or the city's waterworks, to be owned by the county or city, the matter falls under the first paragraph of section 29 of article 2, quoted *supra*, and the legislature need not require an election; the tax being valid without it. *Lauderdale County v. Fargason*, *supra*. However, it can provide that such election be had, under the clause reading, "in such manner as shall be prescribed by law." In such event the provision must be complied with.

But even a direct purpose may be made effective through the device of the county's or the city's lending its credit to some other corporation, company, association, or person, or by subscribing stock therein. In that event the case falls within the second paragraph of the section of the Constitution quoted. This is illustrated by the case of *Colburne v. Railroad*, 94 Tenn., 43, 28 S. W., 298. There it appeared the county of Hamilton, through its county court, entered into a contract with a railroad company to unite with it in the building of a public county bridge, the lower part to be used by the railroad company, and the upper part, or upper story, so to speak, to be used by the county. There was a special act purporting to authorize the contract, but this act did not provide for a submission of the matter to a vote of the people, and there was no such submission. The court held that for this reason the contract was void; that it consti-

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tuted a lending of the credit of the county to the railroad company, and, though for an undoubted county purpose, which the county by its own individual efforts, a county bridge, might have rendered effectual, yet it could not unite with another in such an enterprise without the sanction of a popular vote under the second paragraph of section 29, *supra*.

The illustration is an apt one in respect of the case before us. Public schools are a county purpose, and the county may be authorized to levy taxes directly for them, to be appropriated directly to their support, without the necessity of a popular vote. This would fall under the first paragraph of section 29. But if the county, instead of applying its taxes directly to its public schools, desires to lend its aid to some other educational institution, as in the case before us, engaged in substantially the same work, that is, educating and training the young people or children of the county, that desire can be rendered effectual, and its fruition secured, only by an act of the legislature authorizing it, and the approval of a three-fourths majority obtained by a popular vote thereon. Whether the statute must provide for a submission to the people, or whether the vote may be taken without the act's requiring it, has not been heretofore decided. Mr. Justice WILKES, in the case just cited, in a *dictum*, inclined to the latter view. Mr. Justice CALDWELL, in the later case of *Shelby County v. Exposition Co.*, *supra*, likewise in a *dictum*, expressed the very decided opinion that the act must provide for the

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election. We think the latter view is correct. An election cannot be held unless its holding be directed by law. The Constitution does not order it. It only makes the election a condition of the validity of the lending of the aid of the county or city. It seems clear that the act authorizing the lending of credit should provide for the election; otherwise it is fatally incomplete and is void.

Another point should be noted in respect of *Shelby County v. Exposition Co.*, supra, which is common to all the cases illustrating the effectuation of a county purpose through the direct action of the county authorities, and that is the county handles its own funds, and applies them directly to the matters in hand. Thus in the case just referred to the county appointed its own agents to manage and disburse the fund, and to make effectual the county purpose, the exhibition of its resources. It did not turn the money over to the exposition company. The opposite is true in the case before us. The money, according to the scheme outlined in the acts, is to be turned over to Bolton College to be expended in the construction and equipment of certain desired buildings. Moreover, when the work is completed Bolton College will own the buildings, and the county will have nothing to show for its money.

There is one further thought that should be expressed. We have spoken of a direct and an indirect purpose. This has reference, in addition to the exposition of the matter appearing on a former page, to the

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method of effectuating the purpose, since anything which is a county purpose may be made the occasion of direct or of indirect action. For example, it has been held that a railroad running into or through a county is a county purpose. Such being true, no reason appears why a county might not, if authorized by the legislature, build and own the road itself. This would be an instance of the execution of the purpose directly. On the other hand, the county might aid in the building of the road by lending its credit, or taking stock in the enterprise, under legislative authority, which would be an instance of the indirect execution of the purpose. The latter would require a popular vote; the former would not.

On the grounds stated the chancellor's decree must be reversed, and a decree entered here declaring the bonds void, and perpetually enjoining their issuance.

The defendants will pay the costs.

CHESTER R. JONES v. STATE *ex rel.* JUVENILE COURT.

(*Jackson*. April Term, 1918.)

HABEAS CORPUS. Juvenile court. *Certiorari*. Proceedings as to custody of child.

Statutory *certiorari* from the circuit court lies to review the action of the juvenile court in proceedings involving the custody of a child, and statutory *certiorari* will issue, that the case may be tried again upon its merits in the circuit court, and not the common-law writ of *certiorari*, which opens for review merely the legality of the action of the inferior tribunal.

Cases cited and approved: *Childress v. State*, 133 Tenn., 121; *State of Tennessee ex rel. v. Bochman*, 139 Tenn., 422; *Staples v. Brown*, 113 Tenn., 641; *Connors v. City of Knoxville*, 136 Tenn., 428.

FROM SHELBY.

Appeal from the Circuit of Shelby County.—BEN L. CAPELL, Judge.

L. H. GRAVES, for appellant.

JULIAN G. STRAUSS, for appellee.

MR. JUSTICE GREEN delivered the opinion of the Court.

In this case a petition for *certiorari* was filed in the circuit court of Shelby county to review certain

proceedings in the juvenile court involving the custody of the child, Chester R. Jones, Jr.

The trial judge was misled by the case of *Childress v. State*, 133 Tenn., 121, 179 S. W., 643, and thought that a judgment of the juvenile court was not reviewable in his court on petition for *certiorari*, but that this court had immediate appellate supervision of proceedings in the juvenile court. He accordingly dismissed the petition for *certiorari*.

We have explained in *State of Tennessee ex rel. v. Verbal Bockman*, 139 Tenn, 422, 201 S. W., 741, opinion just filed, that we inadvertently took jurisdiction in *Childress v. State*, *supra*, and that *certiorari* from the circuit court does lie to review the action of the juvenile court. It is statutory *certiorari* which will issue in this case, to the end that the case may be tried again upon its merits in the circuit court (*Staples v. Brown*, 113 Tenn., 641, 85 S. W., 254), and not the common-law writ of *certiorari*, which opens for review merely the legality of the action of the inferior tribunal (*Conners v. City of Knoxville*, 136 Tenn., 428, 189 S. W., 870).

The judgment of the court of civil appeals will accordingly be modified, and this case will be remanded to the circuit court of Shelby county, with directions that the writ of *certiorari* issue to bring up from the juvenile court proceedings herein and have a review of the case in the circuit court.

JUVENILE COURT OF SHELBY COUNTY *et al. v. STATE*
ex rel. HUMPHRY.

(*Jackson*. April Term, 1918.)

1. **HABEAS CORPUS.** Custody of child, Juvenile court judgment.
Res adjudicata.

Where the juvenile court entered a judgment that a child was delinquent, questions determined in such proceeding cannot be again reviewed in *habeas corpus* by the mother of the child, assuming that the proceedings of the juvenile court were valid, since the question of the child's custody was *res adjudicata*. (*Post*, pp. 552-554.)

Acts cited and construed: Acts 1911, ch. 58, sec. 10.

Case cited and approved: State of Tennessee ex rel. Chester R. Jones v. Mrs. B. G. West, 139 Tenn. —.

2. **INFANTS.** Juvenile court proceedings. Necessity of notice.

In a proceeding under Pub. Acts 1911, chapter 58, section 10, on arrest of an infant for homicide, the juvenile court proceedings were not void, for failure to give mother of the boy notice where she was present at the hearing and was examined as a witness, since she thereby entered her appearance and waived the statutory requirement of notice. (*Post*, p. 554.)

3. **INFANTS.** Juvenile courts. Orders. Requisite. Sufficiency.

The juvenile court is a court of special and limited jurisdiction, and its judgments or decrees should show the facts upon which its jurisdiction rests, such as the age of the child, the nature of the proceedings, the service of notice, and the statutory circumstances of delinquency. (*Post*, pp. 554, 555.)

4. **INFANTS.** Criminal responsibility. Presumptions.

The presumption of incapacity of a child to commit a crime is conclusive when the child is under the age of seven years; and, if between seven and fourteen, the burden is on the State

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to show that the child is capable of appreciating the nature of his acts. (*Post*, pp. 555, 556.)

Case cited and approved: *State v. Davis*, 104 Tenn., 501.

5. **INFANTS. Juvenile court. Purpose of proceedings.**

Proceedings in the juvenile court are not criminal in their nature, and are not instituted to punish the child, but to provide for his welfare. (*Post*, p. 556.)

Case cited and approved: *Childress v. State*, 133 Tenn., 121.

6. **INFANTS. Presumptions. Criminal responsibility.**

In a proceeding in the juvenile court for delinquency of a child alleged to have killed his playmate, the age of the child is immaterial; the procedure not being criminal. (*Post*, pp. 556, 557.)

7. **INFANTS. Juvenile court. Jurisdiction.**

Under Pub. Acts 1911, chapter 58, requiring that if a child brought before the juvenile court is probably guilty of murder in either degree, he shall be turned over to the county authorities to be proceeded against according to criminal law, the juvenile court has no jurisdiction of an infant alleged to have committed homicide if the judge thinks he is probably guilty. (*Post*, pp. 557, 558.)

FROM SHELBY.

Appeal from the Circuit Court of Shelby County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—
D. B. PURYEAR, Judge.

JULIAN G. STRAUSS, for plaintiffs.

L. H. GRAVES, for defendants.

MR. JUSTICE GREEN delivered the opinion of the Court.

Harry Humphrey, a child seven years of age, was adjudged by the Juvenile court at Memphis to be delinquent within the meaning of chapter 58 of the Acts of 1911, and was held in the custody of that court. The court had not finally determined on a proper disposition of the child.

Under these circumstances Mrs. P. W. Humphrey, mother of the child, filed a petition for *habeas corpus* in one of the criminal courts of Shelby county, and after a hearing there, the custody of the child was awarded to her. From this judgment of the criminal court the authorities of the juvenile court appealed to the court of civil appeals, where the judgment was affirmed, and the officers of the juvenile court have brought the case to this court by petition for *certiorari*.

It seems that the boy, Harry Humphrey, killed his playmate, a child about nine years of age, with a shotgun. The Humphrey boy was arrested by the police officers of the city of Memphis, but a little later was turned over to the juvenile court, and there was a hearing of the matter in the latter court at which Mrs. Humphrey, mother of the child, was present. There appears to have been some controversy as to whether the killing was accidental or designed. The judge of the juvenile court testified in the *habeas corpus* proceedings that he came to the conclusion from the evidence that a crime

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had been committed, and he accordingly adjudged the Humphrey boy to be delinquent according to the provisions of the statute.

Upon the *habeas corpus* hearing the proceedings below were attacked as void in several particulars, and in addition to this the merits of the matter were gone into by the criminal judge.

We have just held in the case of *State of Tennessee ex rel. Chester R. Jones v. Mrs. B. G. West, Superintendent, et al.*, 139 Tenn., 522, 201 S. W., 743, that the judgment of the juvenile court upon matters like these is conclusive upon the parties on the same state of facts. Assuming the validity of the juvenile court proceedings, the question of the child's custody was *res adjudicata*.

It appears that the proceedings in the juvenile court were had without any formal notice to Mrs. P. W. Humphrey, the mother. The criminal judge was of opinion that such notice was essential to a valid judgment in the juvenile court.

Section 10 of chapter 58 of the Acts of 1911 provides that when a child under sixteen years of age is arrested by police officers and taken before any criminal court, justice of the peace, or police magistrate, that such child shall be forthwith turned over to the officers of the juvenile court, and the case there heard "in the same manner as if the child had been brought before the court upon petition as herein provided. In any case the court shall require notice to be given and investigation to be

made as in other cases under this act, and may adjourn the hearing from time to time for this purpose."

Previous sections of the act provide for the filing of a petition in the juvenile court by any reputable person being a resident of the county, who may have knowledge of a child that appears to be either dependent or delinquent. The petition is required to be sworn to, and upon the filing of the same it is enacted that a summons shall issue requiring the custodian of the child to bring it before the court. The parents of the child, if living and their residence known, or its legal guardian, if one there be, or if there is neither parent nor guardian, or if his or her residence is unknown, then some relative, if there be one, and his residence is known, "shall be notified of the proceedings, and in any case the judge or chairman may appoint some suitable person to act in behalf of the child." This petition should set out the facts believed to constitute the delinquency or dependency of the child, and the notice should issue to the parent, guardian, or relative as provided. If the parent or relative or guardian has actual custody of the child at the time the petition is filed, no notice other than the summons is required to be served upon him. If, however, another has custody of the child, summons should be issued to such custodian and notice likewise served on the parent, guardian, or relative.

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Where a child is arrested by the police authorities, it seems that it is not necessary that any petition be filed in the matter, but a notice must be served upon the parents, guardian, or relative.

We are not inclined to hold the juvenile court proceedings void on account of the failure to give the mother of the boy notice. It appears that she was present at the hearing and was examined as a witness. It seems, furthermore, that she consulted with the officers of the juvenile court and with the judge thereof about the proper disposition of her boy, and we are of opinion that she entered her appearance and waived the statutory requirement as to notice.

The criminal judge further thought that the order adjudging the child a delinquent was so meager in its recitals and contents as to be a nullity.

This order is in the following words:

"Court proceeding July 18, 1916.

"Hon. R. H. Stickley, Judge.

"732.—In the matter of delinquency of one Harry Humphrey, a minor child of the age of seven years, and it appearing to the court that said Harry Humphrey is a delinquent.

"It is therefore ordered, adjudged and decreed by the court that said Harry Humphrey be held in custody until further orders of the court.

"W. EIFLER, Clerk of Juvenile Court."

We do not find it necessary to pass directly on the question of the validity of this order. It certainly

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is quite informal. The juvenile court is a court of special and limited jurisdiction, and its judgments or decrees should show the facts upon which its jurisdiction rests. That it to say, such orders should show the age of the child, as this one does, and, furthermore, should show the nature of the proceedings as that a petition was filed, or that the child was arrested and turned over to the court. The order should likewise show that notice was served upon the parent, guardian, or relative, and should set out the facts found by the court constituting the delinquency or dependency of the child involved; that is, if the child is adjudged dependent, it should appear that the court found that he was destitute or homeless or begging, or such other statutory circumstances of dependency as the evidence showed. If the child is adjudged delinquent, the statutory circumstances of delinquency should likewise appear in the order as that there had been a violation of the law of the State, city, or town (stating the particular law violated), or that the child was incorrigible or otherwise within the meaning of delinquency as defined in the statute.

Great powers are lodged in the juvenile court in its particular field, and proceedings there should be conducted according to the mandates of the statute. Unless there is a substantial compliance with the statutory requirements in these cases, the orders of the juvenile court will be reversed upon a review of the case by *certiorari* in the circuit court.

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The criminal judge was furthermore of opinion that the proceedings in the juvenile court were void because of the presumption of the law as to the incapacity of children of tender years to commit crime. This presumption is conclusive in favor of a child under the age of seven years and between seven and fourteen, the burden is upon the State to show that the child is capable of appreciating the nature of his acts. *State v. Davis*, 104 Tenn., 501, 58 S. W., 122.

As we have noted in *Childress v. State*, 133 Tenn., 121, 179 S. W., 643, proceedings in the juvenile court are not criminal in their nature, and not instituted to punish the child for any offense. The purpose and end of such proceedings is to provide for the welfare of the child, and to remove him from unpropitious surroundings.

The child is not found guilty of delinquency as though guilty of a crime. A finding of delinquency usually demonstrates the necessity for making a change in the custody of the child. The parent or former custodian may be a worthy person, but the child's delinquency indicates that it is not being properly reared—perhaps cannot be readily controlled. Under such circumstances the child's best interests demand that he be subjected to wiser or stronger authority.

So that the age of the child is not material in investigations had before the juvenile court, provided,

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of course, such child is under sixteen years of age, which is the limit of the jurisdiction of that court.

We are of opinion, however, that the criminal judge properly sustained the *habeas corpus* proceedings and removed the Humphrey child from the custody of the juvenile court. We think that court, under the terms of the statute, had no jurisdiction of the matter.

While the order of the juvenile court does not show the fact, the judge of that court testified in these proceedings. He said that from his investigation he thought that a crime had been committed by the Humphrey boy. The only crime that it is suggested could have been committed was that of murder in the first or second degree.

Chapter 58 of the Acts of 1911 expressly provides that when a judge of a juvenile court shall conclude that a child brought before him is probably guilty of murder in the first degree, murder in the second degree, or of rape, that the juvenile court shall at once turn said child over to the authorities of the county to be proceeded against according to the course of the criminal law. In other words, a juvenile court has no jurisdiction when the judge of that court is of opinion that the child brought before him is probably guilty of one of the crimes mentioned.

Such being the facts in this case, the juvenile court was without jurisdiction to make any order

respecting the custody of Harry Humphrey, and the judgment of the criminal court on the petition for *habeas corpus* was correct, and the judgment of the court of civil appeals affirming the judgment below must be affirmed here.

J. H. DAY v. ROBERT L. BURGESS *et al.*

(Jackson. April Term, 1918.)

1. CURTESY. Essentials.

The requisites to a tenancy by the curtesy are marriage, seisin of the wife, birth of a living child capable of inheriting, though it may afterwards die, and death of the wife in the lifetime of the husband. (*Post*, p. 562.)

Acts cited and construed: Acts 1913, ch. 26.

Code cited and construed: Sec. 4249a(T-S.).

2. CURTESY. "Curtesy initiate." "Curtesy consummate." Common law.

At common law, tenancy by curtesy initiate was an estate which became vested at the birth of issue, becoming an estate of the curtesy proper or consummate at the death of the wife before that of the husband, and had no basis in natural or moral right. (*Post*, p. 562.)

Case cited and distinguished: *Billings v. Baker*, 15 How. Prac. (N. Y.), 525; *Bryant v. Freeman*, L. R. A. 1915D., 1004; *Stewart v. Ross*, 50 Miss., 776; *McNeer v. McNeer*, 142 Ill., 388; *Beach v. Miller*, 51 Ill., 206; *Martin v. Robson*, 65 Ill., 129.

Acts cited and construed: Acts 1849-50, ch. 36 (T-S.).

3. CURTESY. Rights of husband. Curtesy initiate.

In view of Thompson-Shannon Code, section 4234, preventing alienation by the husband of the wife's realty without her joining, and section 4239, exempting rents of the wife's realty from seizure for the husband's debts, but providing that such statutes should not interfere with the husband's curtesy initiate, such estate is not entirely destroyed, but merely reduced from a vested estate to a contingent right, since section 4239 refers to curtesy consummate. (*Post*, p. 567.)

Code cited and construed: Sec. 4239(T-S.).

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4. CURTESY. Estate by curtesy initiate.

Though a child was born alive before change in character of curtesy initiate, a statute materially changing such estate applies to all property acquired by the wife subsequent to its enactment. (*Post*, p. 569.)

Acts cited and construed: Acts 1879, ch. 141.

Cases cited and approved: *Hathon v. Lyon*, 2 Mich., 93; *Tong v. Marvin*, 15 Mich., 60; *Clarke v. McCreary*, 12 S. & M., 347; *Thurber v. Townsend*, 22 N. Y., 517; *Allen v. Hanks*, 136 U. S., 307; *Taylor v. Taylor*, 80 Tenn., 490; *Baker's Ex'rs. v. Kilgore*, 145 U. S., 487; *Parlow v. Turner*, 132 Tenn., 339.

Case cited and distinguished: *Travis v. Sitz*, 135 Tenn., 156.

5. CONSTITUTIONAL LAW: Curtesy. Vested rights. Statute.

Where the husband at the effective date of the Married Woman's Emancipation Act (Thompson-Shannon Code, section 4249a) had only an estate by the curtesy initiate, which was not a vested right, since his wife was then living, the legislature could pass such act which prevented the accrual of the curtesy consummate on the wife's death. (*Post*, p. 571.)

Case cited and approved: *Baker v. Dew*, 133 Tenn., 126.

FROM MADISON.

Appeal from the Chancery Court of Madison County.—J. W. ROSS, Chancellor.

J. M. TROUTT, L. MCCOY and W. H. FISHER, for appellant.

BOND & BOND and W. G. TIMBERLAKE, for appellees.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

J. H. Day filed the bill of complaint against the devisees, executors, and trustees named in the will of his wife, asserting his right to an estate of a tenant by the curtesy in three parcels of real estate, including the Southern Hotel property, in the city of Jackson, of the aggregate value of above \$250,000. The will was dated July 6, 1914, and Mrs. Day died July 12, 1914.

It is admitted that a child, the fruit of the marriage, was born in 1874 and died in early infancy. The real estate was acquired by Mrs. Day after 1880.

One of the defenses of the devisees is that since the Married Woman's Emancipation Act of 1913, chapter 26 (Thompson's Shannon's Code, section 4249a), went into effect, it is competent for a married woman by disposing of her real estate by will to bar the accrual of curtesy to her husband at her death. The contention in behalf of complainant, the husband, is that at the birth of said child an estate by the curtesy vested in him, and that it was not within the power of the legislature by any subsequent enactment to deprive him thereof.

Thus there is for the first time presented for decision the effect of the act of 1913 upon curtesy rights of husbands in property of which their wives die seised.

The act referred provides that married women are fully emancipated from all disability on account

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of coverture; and the common law as to the disabilities of married women, and its effect on the rights of property of the wife, is totally abrogated, and marriage shall not impose any disability or incapacity on a woman as to the ownership, acquisition, or disposition of property of any sort, and that a married woman shall have the same capacity to acquire, hold, manage, control, use, enjoy, and dispose of all property in possession, and to bind herself personally, as if she were not married.

Four things are requisite to an estate of tenancy by the curtesy: (a) Marriage; (b) seizure of the wife; (c) birth of a child alive, capable of inheriting from the mother, though it may afterwards die; and (d) the death of the wife in the lifetime of the husband.

Tenancy by the curtesy initiate, at common law, was an estate which became vested at the birth of issue, and became an estate of the curtesy, proper or consummate, at the death of the wife before that of the husband. It was held to be an estate distinct from that of the wife, alienable by the husband and subject to execution for his debts, and giving to him control of the profits from the wife's lands.

It is said that the curtesy by the laws of England was given the husband, in part, for the purpose of aiding him in supporting and educating the issue of the marriage. That this was a minor consideration, however, is shown by the fact that continued existence of the issue after birth was not necessary to raise or to

support the estate. The early writers on the common law disclose that a deeper reason lay in the feudal system which obtained in England in early times, and which affected real property in so many ways.

"The husband, having been dignified by having an interest in lands, was bound to do homage to his superior lord; the estate being once vested in him, it was the policy of the feudal system not to suffer it to determine during the life of the husband, as otherwise the lord might lose the homage that was due from the land. To this estate the husband never had any natural right. Bacon's Abridgement, 'Tenancy by the Curtesy.'

"Sir J. Jekyl says: 'This estate has no moral foundation to support it.' Greenleaf's Cruise, tit. 5, section 3. Crabb, an English writer, says: 'The term "curtesy" is derived from "courtesie," Latin "curialitas," to signify suavity or urbanity, to denote that the custom sprung from favor to the husband, rather than from any right.' By thus becoming the vassal or tenant of his superior lord, he was permitted, 'by the curtesy of England,' to attend his lord's court, or curtis (as it was called), and to do him homage, by reason of having become the husband of a wife who had died possessed of an estate in lands after issue born. Such were the reasons for the introduction of such a title to land into the laws of England." *Billings v. Baker*, 15 How. Prac. (N. Y.), 525; *Id.*, 28 Barb. (N. Y.), 343.

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Not only did the rule fail to find basis on natural or moral right; the estate, introduced into the mother country from Normandy, for the above-recited reasons, could not long stand in full virtue as a thing that harmonized with the principles of American democracy, so that, after a few generations of reverence for the ancient rule, the legislatures of this country began to abolish curtesy initiate entirely, or to deprive that particular tenancy of some of its more rigorous features, until now it stands greatly and essentially modified, or has been abolished absolutely in many States.

Features at first thus stripped from the estate initiate were the right of the husband, as tenant, to sell and transfer the realty of the wife and the right of his creditors to sell it under execution for his debts. As applied to curtesy initiate, the common-law rule worked a deprivation of the wife of the use of her own property during the life of her husband, and the wonder is that the rank injustice of it had to call so long for remedy at the hands of chivalrous legislators of America.

In all, or nearly all, of the States statutes have been passed enlarging the rights and powers of married women in respect to their real property. In many instances this is done by prohibiting the sale by the husband of his wife's realty without her joining in the conveyance, and protecting the property from levy and sale under judgment or decree against the husband. We have such a statute in Acts 1849-50, chapter 36 (Thompson's Shannon's Code, section 4234),

Decisions are not entirely uniform in the several jurisdictions as to the effect of such a statute upon the common-law estate by the curtesy initiate. The annotator of our case of *Bryant v. Freeman*, L. R. A. 1915D, 1004, says:

“Probably a majority of the courts hold that all the attributes of an estate by the curtesy initiate have been destroyed by the statutes, so the estate itself no longer exists, but that the estate by the curtesy consummate is not destroyed, since the statutes do not destroy the attributes of the latter estate, and do not expressly destroy or abolish the estate.”

The courts in some jurisdictions hold that while estates of tenancy by the curtesy initiate are not abolished or wholly destroyed by such statutes they are so essentially modified and changed thereby as that they have lost their vested nature and become mere contingent rights or interests. *Stewart v. Ross*, 50 Miss., 776; *McNeer v. McNeer*, 142 Ill., 388, 32 N. E., 681, 19 L. R. A., 256.

In the last-named case, so much relied upon by all counsel in the instant case, it is said, speaking of an early Illinois act:

“Under the act, the husband as tenant by the curtesy initiate had no control over his wife’s lands. His interest as such tenant could not be conveyed by him, nor was it subject to execution. If the wife died seised of her lands, he was entitled to them as tenant by the curtesy. His estate became consummate upon her death, if she had not disposed of her real estate during her life. So long as she lived, however, his interest

in her land lacked those elements of property, such as the power of disposition and liability to sale on execution, which had formerly given it the character of a vested estate. . . .

“In speaking of the estate of tenancy by the curtesy as affected by the act of 1861, we said, . . . in *Beach v. Miller*, 51 Ill., 206, 2 Am. Rep., 290: ‘The husband’s right to the curtesy is contingent, and until it vests he has no present interest in the land. It does not vest in the husband until the death of the wife;’ in *Martin v. Robson*, 65 Ill., 129, 16 Am. Rep., 578: ‘He (the husband) has now only a modified tenancy by the curtesy, dependent upon a contingency, and no estate vests during the life of the wife. This is rather a shadowy estate.’ ”

The further language of the Illinois court may be more clearly understood and applied, if we substitute for the Illinois act of 1874 our act of 1913, and for the act of 1861 our act of 1849-50 in this excerpt:

“When the act of 1874 went into force, Valentine McNeer’s interest as tenant by the curtesy initiate had not become consummate by the death of his wife. Therefore, inasmuch as that interest had been acquired under the act and had been so changed and modified by the latter act as to be stripped of the essential elements of a vested estate and had been reduced in character to the condition of the ordinary inchoate right of dower, except that it applied to the whole of Mrs. McNeer’s lands instead of one-third thereof, it

follows that such interest was abolished by the act of 1874."

We are of opinion that this is the soundest conception of the situation produced by such legislation; that is, to treat the curtesy initiate as not abolished or entirely destroyed, but as reduced from an estate that is vested to a right that is contingent. In this view the husband has not an estate, but more properly speaking a *status* entitling him to an estate by the curtesy consummate on the contingency that his wife dies. The precedent birth of a living child then becomes a mere condition of the vestiture of the estate by the curtesy consummate; and it is no longer the factor which creates in the husband a vested estate by the curtesy initiate.

We need not, however, hold that the act of 1849-50, of itself and alone, had this effect. It is not all of our legislation that has pared down the power or rights that a husband exercised, under the common law, as tenant by the curtesy initiate. One of these rights was that of enjoying the real estate of the wife after the birth of a child capable of inheriting. It is said that while this right at marriage and before issue inhered in the husband *jure uxoris*, it also became at the birth of a child his own right as tenant by the curtesy initiate. "There is no difference in the rights of tenant by the marital right (*jure uxoris*) and tenant by the curtesy initiate during the life of the wife," at common law. Throughout that period after birth of a child the two rights, denominated estates at com-

mon law, ran concurrently and with a common functioning, the earlier attaching *jure uxoris* not being added to or diminished when curtesy initiate arose. The latter, as said, was an estate not in right of the wife, but in right of the husband himself, and ripened into curtesy consummate on the death of the wife in the lifetime of the husband.

In relation to this doubly based right of enjoyment of the rents, issues, and profits of the wife's real estate during coverture, the following act was passed in 1879 (Thompson's Shannon's Code, section 4239):

"The rents and profits of any property or estate of a married woman, which she owns or may become seized or possessed of, either by purchase, devise, gift, or inheritance, as a separate estate, or for years, or for life, or as a fee simple estate, shall in no manner be subject to the debts or contracts of her husband, except by her consent, obtained in writing." But this provision "shall in no manner interfere with the husband's tenancy by the curtesy."

The last sentence, "this provision shall in no manner interfere with the husband's tenancy by the curtesy," refers to that tenancy proper, or consummate. It could not have reference to curtesy initiate because the terms of the act itself necessarily interfered with and further modified the rights of such a tenant as they were at common law. 8 R. C. L., p. 403.

It is true that the statute last quoted was passed five years after the birth of the child, Florence Day; but all the real estate in question here was acquired

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after 1879. May the provisions of that statute be considered as having tendency to further strip the common-law estate of curtesy initiate of its absolute or vested character, and bring it to the plane of a contingent or inchoate interest in the husband, in the lands so acquired by Mrs. Day?

If, though a child has been born alive at a time when tenancy by the curtesy initiate, as a vested estate, has not been abolished or vitally changed as to nature, the wife has not acquired or become seised of any real property to which curtesy could attach, and thereafter a statute is enacted which gives the wife power of control or disposition of her property or takes away the husband's common-law right of control, as such tenant, in respects which seriously impair it, then the last-named statute becomes applicable to all property which the wife may acquire subsequent to its enactment. *Hathon v. Lyon*, 2 Mich., 93; *Tong v. Marvin*, 15 Mich., 60; *Clarke v. McCreary*, 12 Smedes & M., 347; *Thurber v. Townsend*, 22 N. Y., 517; *Allen v. Hanks*, 136 U. S., 309, 10 Sup. Ct., 961, 34 L. Ed., 414. See, also, *Taylor v. Taylor*, 12 Lea (80 Tenn.), 490; *Baker's Ex'rs v. Kilgore*, 145 U. S., 487, 12 Sup. Ct., 943, 36 L. Ed., 786.

When, therefore, we look as we may to both statutes, the act of 1879 along with the act of 1849-50, we think it still more manifest that the legislative intent was to leave tenancy by the curtesy initiate shorn of all the essential elements of a vested estate, as already indicated.

It was held in *Parlow v. Turner*, 132 Tenn., 339, 178 S. W., 766, that the common-law estate *jure uxoris* had been so materially modified by these statutes that only a bare privilege was left to the husband in respect of the rents and profits of the wife's lands—to rent out her lands and to collect the rents for the benefit of the family, in the capacity of governor of the family, but for the family and not for himself individually. From what has been said above, it is clear that the same statutes operated upon the common-law estate of the curtesy initiate in like manner. In *Parlow v. Turner*, the *jure uxoris* was said to be, since the act of 1879, one of a contingent nature, as relates to future accruing rents; and by parity of reasoning the same thing is true of the right formerly incident to the curtesy initiate, in the same regard.

In *Travis v. Sitz*, 135 Tenn., 156, 168, 185 S. W., 1075, L. R. A., 1917A, 671, it was said on this point:

“By Acts 1879, chapter 141, the rights of the husband in the wife's land, as tenant by the curtesy initiate, were so reduced that he was left only the privilege of renting out the land as governor of the family, and of collecting rents for the benefit of the family.”

As was further said in *Travis v. Sitz*, applicable in this case on the effect of both of the above statutes to exclude the husband's right as tenant by the curtesy initiate:

“It is difficult to conceive of the husband (without the intervention of some form of trust) owning property which is not at all liable for his debts, nor subject

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to his contractual powers. So by exclusion of the legal incidents that attend the right of property it is clear on principle that the language could have no other meaning than an intention to exclude the husband."

Holding as we do that there was at the time no vested estate of curtesy initiate in complainant, it was competent for the legislature by the act of 1913 to provide for his deprivation of all contingent rights to curtesy, as it did by that act. An estate of curtesy consummate had not attached in his favor before that act. Mrs. Day's death, which alone could cause that estate consummate to vest, was subsequent to the date when that act went into effect, January 1, 1914.

The act of 1913 (chapter 26) gave the wife power to dispose of her real estate by will, as if she were a *feme sole*, and, therefore, thereby to defeat the accrual to the husband of an estate by the curtesy consummate at her death. *Parlow v. Turner*, supra; *Baker v. Dew*, 133 Tenn., 126, 135, 179 S. W., 645.

The chancellor reached the same result, by a ruling upon another question which it is unnecessary to treat of, since the rulings on the points discussed above dispose of the whole case.

Affirmed.

J. W. HULL v. MARY V. HULL et al.*(Jackson. April Term, 1918.)***1. CURTESY. Consummate. Statutes. Construction.**

The Married Woman's Emancipation Act (Thompson-Shannon Code, section 4249a) did not of itself abolish the estate of tenancy by the curtesy consummate. (*Post*, p. 573.)

Cases cited and approved: *Day v. Burgess*, 202 S. W., 911; *Bryant v. Freeman*, L. R. A. 1915D., 1004; *Hackensack Trust Co. v. Tracy*, 86 N. J. Eq., 301.

Code cited and construed: Sec. 4249a(T-S.).

2. CURTESY. Consummate. Lands of wife. Effect of husband's paying therefor.

Where the husband pays for lands, directing the grantor to convey them to the wife, he acquires an estate by the curtesy consummate in such lands of his intestate wife, although no agreement between them, nor provision in the deed, dealt with curtesy, since, though the title was the wife's separate estate, an estate by the curtesy consummate may attach thereto when there is no specific language in the deed cutting off such estate. (*Post*, p. 574.)

Cases cited and approved: *Ferguson v. Booth*, 128 Tenn., 259; *Barnum v. Le Master*, 110 Tenn., 638; *Travis v. Sitz*, 135 Tenn., 156; *Bingham v. Weller*, 113 Tenn., 70; *Frazer v. Hightower*, 59 Tenn., 94; *Depue v. Miller*, 65 W. Va., 120; *Vanderweeer v. Vanderveer*, 1 N. Y. Supp., 897; *Rautenbusch v. Donaldson* (Ky.), 18 S. W., 538; *In re Kaufmann* (D. C.), 142 Fed., 898.

3. CURTESY. Consummate. Liability on mortgage.

Where husband bought lands, and the deed ran to the wife, and they later joined in a trust deed for money borrowed, the husband, on the wife's death intestate, could not establish tenancy by curtesy consummate, without personally discharging the

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mortgage for protection of their minor children, since, as between husband and wife, the mortgage was his primary obligation. (*Post*, p. 578.)

FROM SHELBY.

Appeal from the Chancery Court of Shelby County.—F. H. HEISKELL, Chancellor.

P. H. PHELAN, JR., for appellant.

C. W. ANDERSON, for appellees.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

In this case there is necessarily presented for decision the question: Did the Married Woman's Emancipation Act (Thompson's Shannon's Code, section 4249a) have the effect of itself to abolish the estate of tenancy by the curtesy consummate?

A reply in the negative was foreshadowed by what was said by the court in the case of *Day v. Burgess*, 139 Tenn. 559 202 S. W., 911, the opinion in which has just been handed down; and we now rule the point accordingly.

While a few courts have held that enactments which thus broaden and extend the rights of married women have the effect to abolish curtesy consummate, the large majority hold that there is no destruction of that estate—that it is only subject to defeat by the

act of the wife in making or suffering a disposition of her property in her lifetime. The act does not in express terms abolish the estate consummate, nor does it destroy or undermine its essential attributes. The authorities *pro* and *contra* may be found collected in a comprehensive note to the case of *Bryant v. Freeman*, L. R. A., 1915D, 1004, 1009; and see the recent case of *Hackensack Trust Co. v. Tracy*, 86 N. J. Eq., 301, 99 Atl., 846.

Another and closer question is raised: Is there an estate of tenancy by the curtesy consummate in lands of an intestate wife, which lands were paid for by the husband who directed a third person as grantor to convey the lands to the wife, in the absence of any agreement between the husband and wife, or provision in the deed of conveyance, touching the right of curtesy.

We answer this question in the affirmative.

It is true that the title in such circumstances vests in the wife to her separate estate, even though no apt words are incorporated in the deed of conveyance to define a separate estate. *Ferguson v. Booth*, 128 Tenn., 259, 160 S. W., 67, Ann. Cas., 1915C, 1079, extending the doctrine of *Barnum v. Le Master*, 110 Tenn., 638, 75 S. W., 1045, 69 L. R. A., 353.

It is firmly established in this State that an estate of curtesy consummate may attach to lands of the wife held to her separate estate, where there is no language in the deed clearly cutting off the husband's rights beyond the wife's death. *Travis v. Sitz*, 135

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Tenn., 156, 183, 185 S. W., 1075, L. R. A., 1917A, 671, and cases there cited.

The argument against the husband's curtesy in the pending case, where the deed on its face would create a general estate but for the special circumstances, is based upon the case of *Bingham v. Weller*, 113 Tenn., 70, 81 S. W., 843, 69 L. R. A., 370, 106 Am. St. Rep., 803, where it was held that a conveyance directly from the husband to the wife divests him of all interest, present or contingent, in the land, including an estate by the curtesy therein. It is argued that, in this case equally with that, the separate estate arises by necessary implication; the act of the husband being the efficient factor in its creation. The argument overlooks the fact that in *Bingham v. Weller*, supra, the husband was the grantor in a deed of conveyance containing a covenant of general warranty. We have a statute which provides that every grant of real estate shall pass the entire estate of the grantor, unless a contrary intent appears from the terms of the instrument. This statute was referred to indirectly in the opinion in *Bingham v. Weller*, supra, but the writer did not clearly express the thought that the statute availed to control the decision.

This was explained and no doubt left as to that influence of the statute in the later case of *Mitchell v. Bank*, 126 Tenn., 669, 675, 150 S. W., 1141, 1142, in this language:

"Counsel for the complainant presses the case of *Bingham v. Weller*, 113 Tenn., 70, 81 S. W. 843, 69

L. R. A., 370, 106 Am. St. Rep., 803, upon the consideration of the court. In that case it was held that a husband, who by deed conveys real estate to his wife, and thereby creates in her, as to such property, a separate estate (*Barnum v. Le Master*, 110 Tenn., 638, 75 S. W., 1045, 69 L. R. A., 353), also by the same deed conveys and cuts off his rights as tenant by the curtesy in such land.

“Section 3672 of Shannon’s Code, to the effect that every grant or devise of real estate shall pass the entire estate of the grantor or devisor, unless an intention to pass a less estate appears from the terms of the instrument, was doubtless considered by the court in *Bingham v. Weller*, and the conclusion reached that the husband’s deed passed his inchoate right to curtesy. This statute was referred to in *Barnum v. Le Master*, and the decision party rested thereon. We have no such statute in regard to conveyance of personalty. *Bingham v. Weller* followed the case of *Barnum v. Le Master* to its limit, and then proceeded much beyond.

“Inasmuch as we are not dealing here with a conveyance of real estate, it is not necessary to discuss the result reached in *Bingham v. Weller*, except to say we are unwilling to extend the authority of that case to such a latitude as the complainant here seeks to press it.”

The conveyance in the instant case not being one by the husband as grantor, the rule of *Bingham v. Weller* does not govern.

Counsel for the heirs at law urge upon us that the case of *Ferguson v. Booth*, supra, is authority for a denial of the husband's claim to curtesy. This is a misconception of the opinion in that case which in no way treats of curtesy and which has no sort of bearing on the question here to be determined. The insistence seems to be based upon an expression in that opinion to the effect that where the husband so pays for land conveyed by a third person to the wife, there is no resulting trust in his favor. This means, of course, no resulting trust that could defeat the vesting in the wife of a separate estate. Conceding as we have that a separate estate was vested in the wife, the question reverts: Is the husband barred of an estate of curtesy therein?

We hold that he is not. In *Bingham v. Weller*, it was said to be clear that there is nothing in a deed to deprive the husband of his curtesy in the land if that deed was made by a third person; and *Frazer v. Hightower*, 12 Heisk. (59 Tenn.), 94, was cited with approval. The question in the case last cited was, whether the husband, after the death of the wife, took an estate of curtesy in lands which the husband had conveyed to a trustee for the benefit of his wife, and the decision was that, as the deed made no settlement of the land after the death of the wife, the husband's rights were abridged only during her life; and, the husband was taken to have intended, when he made the conveyance, that the wife was to hold the estate as every estate of inheritance is held by her—subject

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to curtesy consummate where that is not clearly excluded. Cases in accord with *Frazer v. Hightower* are collected in *Depue v. Miller*, 65 W. Va., 120, 64 S. E., 740, 23 L. R. A. (N. S.), 775.

The right of the husband to curtesy in the circumstances of this case has been sustained in *Vanderweer v. Vanderveer*, 1 N. Y. Supp., 897;¹ and seemingly denied in *Rautenbusch v. Donaldson* (Ky.), 18 S. W., 538; while in *Re Kaufmann* (D. C.), 142 Fed., 898, it was held that curtesy is not defeated by the fact that the land was conveyed by the husband by general warranty deed to one who afterwards conveyed to the wife. We have found no other cases that rule the point.

We hold that as there is lacking here the clear intention necessary to bar curtesy, the chancellor erred in his ruling against the husband on this issue.

A further assignment of error remains to be considered. The suit being one for the ascertainment of the rights of the husband and father on the one hand, and his defendant minor children on the other, in the real estate, these facts were made to appear: The real estate of the wife was incumbered by a trust deed, jointly executed by complainant and his wife, to secure the sum of \$2,500 borrowed by and for the use of the husband and represented by a note signed by him and his wife as comakers. Since the death of Mrs. Hull, complainant has paid a part of that note. The chancellor held that he was liable for the unpaid bal-

¹ Reported in full in the New York Supplement, reported as a memorandum decision without opinion in 49 Hun., 608.

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ance, and that he should discharge the trust debt in order to the protection of the heirs. This ruling is complained of and it is contended that, when a wife raises money by a trust deed or mortgage on her separate estate and turns the proceeds over to the husband, in the absence of proof showing that the fund is loaned and not passed as a gift, she and her representatives cannot recover it of the husband. It is argued that the law presumes a gift in that case.

Here, however, the wife merely pledged her separate estate, and the husband was, as between himself and wife, the primary obligor on the secured note, and the note imported a promise on his part to pay as primary obligor, *inter sese*. The funds passed to the husband under that agreement; and we think the chancellor was clearly right when he held against the complainant husband on this question.

The estate by the curtesy consummate, denied to the husband below, but sustained in this court, will be subjected first in order to the payment of such balance, if the husband shall fail to discharge the incumbrance under his obligation *in personam*, represented by the note, so to do.

The transaction was prior to the passage of the Married Woman's Act, above referred to.

Let the decree of the chancellor be modified accordingly; all accrued costs will be paid two-thirds by the complainant and one-third by the defendants, and the cause is remanded for further proceedings consistent with which is herein ruled.

RICHARD JOHNSON v. MARTIN FURNITURE CO.*(Jackson. April Term, 1918.)***1. APPEAL AND ERROR. Record. Agreed case. Motion for new trial.**

Where a cause was submitted solely upon an agreed statement of facts, the agreed case became a part of the record without certification by the trial court, and, no bill of exception being required, a motion for new trial was not essential to an appeal. (*Post*, p. 581.)

Cases cited and approved: *Railroad v. Johnson*, 114 Tenn., 632; *Seymour v. Railroad*, 117 Tenn., 98; *Railroad v. Ray*, 124 Tenn., 16.

2. SALES. Conditional sales. Personal judgment. Replevin.

The taking of a personal judgment against a purchaser under a conditional sales contract upon default does not preclude resort to replevin to bring the property to sale under Thompson-Shannon Code, section 3666; the retention of title being security for the personal obligation, which security is not lost by the judgment. (*Post*, p. 582.)

Cases cited and approved: *Frisch v. Wells*, 200 Mass., 429; *Francis v. Bohart*, 76 Or., 1; *Norman v. Meeker*, 91 Wash., 534; *Automobile Co. v. Bicknell*, 129 Tenn., 496; *Stephens v. Greene County Iron Co.*, 58 Tenn., 71; *Rossiter v. Merriman*, 80 Kan., 739; *Bank v. Bradley*, 83 Tenn., 279; *Ballinger v. West Pub. Co.*, 239 U. S., 646; *Turner v. Brock*, 53 Tenn., 59; *Hines v. Perkins*, 49 Tenn., 395; *Southern Ice Co. v. Alley*, 127 Tenn., 173.

Cases cited and distinguished: *Chitwood v. Trimble*, 61 Tenn., 78; *Lovejoy v. Murray*, 3 Wall. (70 U. S.), 1.

Code cited and construed: Sec. 3666 (T.S.).

FROM SHELBY.

Appeal from the Circuit Court of Shelby County to the Court of Civil Appeals and by *certiorari* to the Court of Civil Appeals, from the Supreme Court.—BEN L. CAPELL, Judge.

B. F. BOOTH, for plaintiff in error.

DUNCAN MARTIN, for defendant in error.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

This is an action of replevin to recover possession of furniture sold to Johnson under a conditional sale contract calling for installment payments.

The trial in the circuit court was before the trial judge, without the intervention of a jury, and upon an agreed case, or statement of facts, signed by the attorneys of the parties and filed as a part of the record of the cause. No witness or documentary evidence was introduced. The right of the furniture company to so proceed in replevin was sustained by the circuit judge, and Johnson appealed to the court of civil appeals. He had not made a motion for a new trial in the circuit court, and the appellate court held that because of that failure it could not review the

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judgment of the circuit court, citing *Railroad v. Johnson*, 114 Tenn., 632, 88 S. W., 169; *Seymour v. Railroad*, 117 Tenn., 98, 98 S. W., 174.

This was an erroneous ruling. The agreed case when filed became a part of the record without any certification or signing by the trial judge. No bill of exceptions was requisite to preserve the grounds of exceptions as the foundation for a motion for a new trial. Such a motion was not essential. 3 C. J., 964; *Railroad v. Ray*, 124 Tenn., 16, 134 S. W., 858, Ann. Cas., 1912D, 910.

The court of civil appeals should have passed upon appellant's assignment of error in that court, as we now do; he having reassigned it in his petition for *certiorari* in this court.

The furniture company in the written sale contract retained title to the goods until paid for in full by the vendee, together with the right to take possession and dispose of same in accordance with the conditional sales statute. Johnson having made default as to certain installment payments, the furniture company sued and recovered a personal judgment thereon. Execution was returned *nulla bona*, and this replevin suit was later brought.

Petitioner Johnson insists that the taking of the personal judgment was a conclusive election on the part of the seller which prevents a subsequent resort to replevin, and his counsel relies upon the doctrine set forth in cases such as *Frisch v. Wells*, 200 Mass., 429, 86 N. E., 775, 23 L. R. A. (N. S.), 144, and *Francis*

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v. *Bohart*, 76 Or., 1, 143 Pac., 920, 147 Pac., 755, L. R. A., 1916A, 922; *Norman v. Meeker*, 91 Wash., 534, 158 Pac., 78, Ann. Cas., 1917D, 462.

The reasoning of the courts which enforce this view is: That the vendor, upon breach by the vendee, has the option (a) to treat the contract as an agreement for goods sold and delivered and to sue for the price on that theory, or (b) to sue in tort for conversion, or in replevin for a specific recovery. If therefore the first remedy be resorted to, it rests upon the theory that after breach the title passed to the vendee, at the election of the plaintiff vendor. But, if one of second class of remedies be adopted, it rests upon the assumption that the title still remains in the plaintiff. These remedies, although alternative, are therefore held to be so far inconsistent that the bringing of a suit to obtain a personal judgment is a decisive election which precludes a later resort to replevin, or to trover for conversion. There is a sharp divergence in the decisions on this question, due perhaps to differences in fundamental conceptions as to the nature of the title retained in a conditional sale contract.

In this State such retention of title by a vendor is a security for the personal obligation for the price, partaking of the nature of a lien upon the chattel. *Automobile Co. v. Bicknell*, 129 Tenn., 496, 167 S. W., 108, Ann. Cas., 1916A, 265, and cases cited.

In this jurisdiction and several others, in contemplation of law, the personal obligation or debt is one thing, and the lien on given property securing the debt

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is another. The creditor may enforce both, and his election to pursue one does not exclude or waive the other as a remedy. Thus the lien of a mortgage, whether on chattels or realty, is not merged by taking of a judgment on the obligation *in personam* without satisfaction, and the lien may be thereafter foreclosed in an action, to satisfy the judgment. *Stephens v. Greene County Iron Co.*, 11 Heisk. (58 Tenn.), 71; *Rossiter v. Merriman*, 80 Kan., 739, 104 Pac., 858, 24 L. R. A. (N. S.), 1095; 15 R. C. L., p. 789.

There is in this view of the basic right of the vendor no inconsistency in the two remedies or remedial rights. The action of replevin may be prosecuted to obtain possession, for the purpose of bringing the chattel to a sale under the terms of Thompson's Shannon's Code, section 3666. By section 3668, should the property fail to bring a sum sufficient to satisfy the seller's claim, the balance is a valid indebtedness against the purchaser.

Under the conception of the nature of the title retained so entertained by this court, there are, as has been observed, two features to be reckoned with: (a) The personal obligation, and (b) the lien which is incident to as security for that obligation. It was held in *Chitwood v. Trimble*, 2 Baxt. (61 Tenn.), 78, that the taking of a judgment on a note which was secured by an express vendor's lien did not operate to waive the lien, and that the lien might thereafter be enforced in an action brought for the purpose. The court there said:

"The lien was the incident of the debt, and not simply of the note, which was the evidence of the debt. Therefore, when the note was merged into a judgment, that became the evidence of the debt, and the lien continued an incident thereto. . . . The judgment against Trimble (the vendee) continued in force, and the lien, as an incident thereto, continued to exist."

See, also, *Bank v. Bradley*, 15 Lea (83 Tenn.), 279, 296; *Ballinger v. West Pub. Co.*, 239 U. S., 646, 36 Sup. Ct., 167, 60 L. Ed., 484.

In *Turner v. Brock*, 6 Heisk. (53 Tenn.), 50, it was held that the taking of a judgment *in personam*, in an action of case against a trespasser for the loss of property, does not prevent the maintenance of an action of replevin for that property; the judgment not having been satisfied.

In *Lovejoy v. Murray*, 3 Wall. (70 U. S.), 1, 18 L. Ed., 129, it was said:

"If the judgment does represent the price of the goods, does it follow that the defendant shall have the property before he has paid that price? The payment of the price and the transfer of the property are, in the ordinary contract of sale, concurrent acts. But in all such cases, what has the defendant in such second suit done to discharge himself from the obligation which the law imposes upon him, to make compensation? His liability must remain, in morals and on principle, until he does this."

See, also, for an analogous ruling, *Hines v. Perkins*, 2 Heisk. (49 Tenn.), 395, 402; and see *Southern Ice Co. v. Alley*, 127 Tenn., 173, 154 S. W., 536.

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As suggested in argument, not infrequently it is the case that there is a disagreement as to the amount due from the purchaser, and such difference may be settled by the bringing of a suit for personal judgment at less cost and at less risk to the seller, than in an action of replevin.

If replevin follows the taking of such a judgment, and is sustained, ground is thereby afforded for a declaration of the satisfaction of the judgment in full or *pro tanto* as the case may be. The same result perhaps would be consequent upon a conversion of the property by a failure on the seller's part to bring to sale, as our conditional sales statute provides, after possession is thus obtained.

The ruling of the court of civil appeals is reversed in order to an affirmance of the judgment of the circuit court in favor of the furniture company. Costs of the appeal will be paid by appellant Johnson. The cause is remanded to the circuit court for further proceedings.

A. CAMERON WILLIAMS v. A. P. GAITHER.

(*Jackson*. April Term, 1918.)

1. **INSANE PERSONS. Actions. Parties. Next friend.**

A suit may be brought in behalf of a person of unsound mind by a next friend in the name of such person, either before or after inquisition of lunacy, where no guardian or committee has been appointed. (*Post*, p. 589.)

Cases cited and approved: *Morgan v. Potter*, 157 U. S., 195; *Parsons v. Kinzer*, 71 Tenn., 346; *Isle of Cranby*, 199 Ill., 39.

2. **INSANE PERSONS. Actions by next friend. Subsequent guardian. Control of action.**

In a suit brought by the next friend of an insane person, his subsequently appointed guardian had the right to control the suit by being substituted for the next friend, but could not appear otherwise and have the suit dismissed at the cost of the next friend. (*Post*, p. 589.)

3. **INSANE PERSONS. Actions. Next friend. Substitution.**

A next friend bringing a suit for an insane person is in a sense a volunteer, and the court of pendency may at any time investigate his fitness to represent the incompetent's interests, may allow or direct that some one else be substituted in his place and will ordinarily substitute a subsequently appointed guardian upon application. (*Post*, p. 591.)

Cases cited and approved: *Kingsbury v. Buckner*, 134 U. S., 650; *Plympton v. Hall*, 55 Minn., 22.

4. **ATTORNEY AND CLIENT. Lien for fees.**

Attorneys who properly brought a suit for an insane person by his next friend have a lien upon the cause of action for their fees. (*post*, p. 591.)

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5. INSANE PERSONS. Actions. Costs.

A guardian appointed subsequent to a suit by her insane ward by his next friend should not be allowed to dismiss the suit without payment of costs. (*Post*, p. 592.)

FROM SHELBY.

Appeal from the Circuit Court of Shelby County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—
BEN L. CAPELL, Judge.

CARUTHERS EWING and PRESCOTT & MOGEVENY, for plaintiff.

WILSON & ARMSTRONG and WRIGHT, MILES, WARING & WALKER, for defendant.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

On March 31, 1917, A. Cameron Williams by his wife, Florence M. Williams, as next friend, sued A. P. Gaither for \$20,000, averring that Gaither had negligently struck Williams with an automobile, fracturing his skull; and it was further averred that "he has lost his mind, and is now insane and confined as a maniac in the insane asylum at Bolivar, Tenn."

On July 25th Mrs. Ellis, his mother, was appointed by the probate court guardian of said Williams, the latter treated as a *non compos mentis*.

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On August 11, 1917, a suit was instituted by "A. Cameron Williams, a *non compos*, who sues by his regular guardian, Mrs. Anna C. Ellis," against Gaither on account of the injury which was made the subject of the suit instituted on March 31, 1917.

The two suits so pending, the regular guardian, Mrs. Ellis, filed a petition in this cause, being the one instituted by the wife as next friend, and therein asserted the legal right to dismiss the action at the cost of the next friend.

Florence M. Williams, next friend, moved to strike this petition from the file, and the court held that the regular guardian of A. Cameron Williams had the right to control all litigation in his behalf and dismissed the suit of the next friend.

On appeal the court of civil appeals affirmed the judgment of the circuit court, and the next friend of plaintiff in the first suit has petitioned us for a review of that ruling.

The question of the right of the guardian to cause such a dismissal is stated by counsel to be one of first impression under common-law practice.

A suit by a next friend must be brought in the name of the infant or *non compos*, since it is the latter, and not the next friend, who is the real and proper party. The next friend is neither technically nor substantially a party, but resembles a guardian *ad litem* by whom a suit is brought in behalf of one not *sui juris*. *Morgan v. Potter*, 157 U. S., 195, 15 Sup. Ct., 590, 39 L. Ed., 670.

An action may be brought on behalf of a person of unsound mind by a next friend, either before the inquisition of lunacy, or after the inquisition, where no guardian or committee has been appointed. *Parsons v. Kinzer*, 3 Lea (71 Tenn.), 346; *Isle v. Cranby*, 199 Ill., 39, 64 N. E., 1065, 64 L. R. A., 513, and cases collected in note.

The first suit having been properly brought, what right had the guardian by motion or petition therein to have it dismissed? If, and so long as, the guardian proceeds on the basis of the first suit being wrongfully brought or prosecuted by the next friend, she is to be deemed to be a stranger to that action, and as such she could not successfully so move to dismiss it. 14 Cyc., 397.

The true conception seems to us to be that the regularly appointed guardian became the successor of the next friend in respect of the right to control the suit. Upon the due appointment of the guardian, the power to control the *non compos* and his affairs, including the suit, devolved upon her. The power formerly exercisable by the next friend was superseded by that belonging to the regularly appointed guardian. The greater power overlapped and, so to speak, absorbed the lesser at the guardian's election. It is not to be tolerated that property rights of a *non compos mentis* should be controlled by a next friend after the appointment of a regular guardian, against the will of the latter. Neither is it to be recognized that the guardian may at will thus set at naught what the next friend

has precedently done, under the law's sanction, in bringing suit. If she wishes, as a part of her right of control, to dismiss such suit, she must do so by asserting her right of succession to the next friend. The proper course, therefore, was for the guardian to move to be substituted as plaintiff in the first suit; then, if she desired for any reason, she might have dismissed that suit and brought another, or assumed continued control of that action. But she would in either event do so by adopting the action, and taking the reins from the hands of the next friend, and not as one claiming as an antagonist, or rival plaintiff.

While a next friend may in a certain sense be a volunteer in bringing suit, the continuance of the exercise of his function is within the power of the court. It is in the province of the court of pendency, at any time, to inquire into his fitness to represent the interests of the incompetent; and to allow or direct that some one else be substituted in his place. *Kingsbury v. Buckner*, 134 U. S., 650, 10 Sup. Ct., 638, 33 L. Ed., 1047. *A fortiori* would the court substitute the guardian to actorship and control, on the motion of the guardian though subsequently appointed. *Plympton v. Hall*, 55 Minn., 22, 56 N. W., 351, 21 L. R. A., 675.

The view of the rights of the parties enforced by the court of civil appeals would not admit of as just incidental results as does the one we declare.

The attorneys employed by the next friend have a lien upon the cause of action for their services in the first suit. What becomes of their claim to protection

for services up to the time the guardian may discontinue their employment, if our view be incorrect.

What becomes of the court costs validly incurred in the first action? The guardian should not be allowed to dismiss the suit, and escape liability for or risk of payment.

Grant the writ of *certiorari*, reverse the judgment of the court of civil appeals, and remand for further proceedings. Costs will be paid by the respondent guardian.

CHARLES M. WEINSTEIN *et al.* v. L. BARRASSO.

(Jackson. April Term, 1918.)

1. **APPEAL AND ERROR.** Review. Record. Finding of court without request.

There being no request therefor by either party, a written opinion or finding of facts filed by the trial judge is no part of the record, and the judgment must be treated as a general verdict under a correct charge and affirmed if it may be rested on any theory supported by material evidence. (*Post*, p. 595.)

Cases cited and approved: *Brooks v. Paper Co.*, 94 Tenn., 701; *Stephens v. Mason*, 99 Tenn., 512.

2. **LANDLORD AND TENANT.** Negligent use of rooms by other tenants. Eviction.

Where a landlord surrenders to tenants possession of upstairs rooms in which are installed proper closet fixtures, and such tenants by negligent use cause overflows of water, to the injury of tenants below, the landlord not being responsible therefor, such acts are not an eviction. (*Post*, p. 595.)

3. **LANDLORD AND TENANT.** Action for rents. Defenses. Eviction.

A tenant cannot claim a constructive eviction before surrendering the premises, and such eviction is no defense to an action for rents, then overdue, although payable in advance. (*Post*, p. 597.)

Cases cited and approved: *Kuschinsky v. Flanigan*, 170 Mich., 245; *Edmison v. Lowry*, 3 S. D., 77.

Cases cited and distinguished: *Johnson v. Oppenheim*, 12 Abb. Prac. N. S. (N. Y.), 449; *Wilson v. Smith*, 13 Tenn., 379.

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Weinstein v. Barrasso.

FROM SHELBY.

Appeal from the Circuit Court of Shelby County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—D. W. DeHAVEN, Special Judge.

G. J. McSPADDEN, for plaintiffs in error.

MOSSTEROLE & GLANKLER, for defendant in error.

MR. JUSTICE GREEN delivered the opinion of the Court.

This suit was brought to recover on a rent note for \$125. There was a judgment in favor of plaintiff below, which was affirmed by the court of civil appeals, and the case is before us on petition for *certiorari*.

The Weinstens rented a storehouse from Barrasso, located on Main street in Memphis. They were merchants and pawnbrokers. The upper floors of this building were rented by Barrasso to other parties for a rooming house.

The lease of the Weinstens was for three years, and terminated August 31, 1916. They moved out on September 30, 1915. This suit is to recover rent for the month of September, 1915, only.

The plaintiffs in error defend on the ground that there was a constructive eviction, or a partial eviction.

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It seems that there was a water-closet on the second floor of this building immediately over the rear of the store rented to them, and by reason of overflows from this place and the leaking of foul water into their store, they insist: (1) That a nuisance accrued which in law amounted to a constructive eviction; and (2) that they were actually dispossessed of a part of these premises.

There was a written opinion or finding of facts filed by the trial judge. There was, however, no request for such a finding by either party below. Under our cases, therefore, this finding of facts is no part of the record, and the judgment rendered must be treated as a general verdict under a correct charge and affirmed, if it may be rested on any theory, supported by material evidence. *Brooks v. Paper Co.*, 94 Tenn., 701, 31 S. W., 160; *Stephens v. Mason*, 99 Tenn., 512, 42 S. W., 143.

The trial judge placed his decision on the ground that there could be no constructive eviction without a surrender of the premises. 16 R. C. L., p. 949; 24 Cyc., 1130. He concluded that since the plaintiffs in error remained in possession and occupancy of the premises during the month of September, 1915, and until October 1st, they could not claim an eviction prior to that time. He did not discuss the question of partial eviction.

There was evidence below tending to show that the fixtures in this closet, while old, would have caused no trouble if they had been properly used; that the over-

flow was occasioned by the negligence of the patrons of the rooming house in throwing large quantities of paper into the toilet; that when this paper would be removed, the overflow would cease.

The court of appeals thought that the trouble was created by the misfeasance of the tenants above; that the fixtures furnished by the landlord to the tenant above were not dangerous or unsuitable *per se*; and that the injury to plaintiffs in error was caused by the negligent acts of other tenants for which the landlord was not responsible.

As above seen, there is evidence to sustain this theory. On such a theory the conclusion of the court of civil appeals was sound and is supported by authorities cited by that court.

“The landlord is not liable for injury to a tenant in a building caused by the improper use of appliances within the exclusive control of a tenant in another part of the building; as when water fixtures on the premises of one tenant are improperly used by the latter so as to cause a flooding of the premises of another tenant. Nor is the landlord liable when the injury results from defects in appliances on premises leased by him to another when these defects arise after the lease without the landlord’s fault, though he is liable if the damage is caused by defects existing at the time of such lease.” *Tiffany on Landlord and Tenant*, 645.

“If the landlord provides pipes and other plumbing work of good quality and surrenders possession, the tenant only is responsible for the mode in which these

things are used and for any overflow caused either by neglect to turn off the water or by such misuse of the works as deprives them of the power to stop the flow of water." Sherman & Redfield on Neg. section 723.

On this theory of the case there was no eviction at all, for eviction must be by an act of the landlord or by an act of some other person for which he is answerable. Trespasses or other acts of third persons, unless committed "under the direction of, or at the instance of, or with the consent of the lessor" do not amount to an eviction. 24 Cyc., 1132; 16 R. C. L., 685.

It is insisted, however, by counsel for plaintiffs in error that this overflow was occasioned by defective plumbing in the upstairs closet, and that the landlord by letting for use such premises in such condition, known to him, became immediately responsible for the results.

It is said that the filthy water and the stench actually dispossessed plaintiff in error of part of the premises rented by them, and authorities are cited which hold that partial eviction will relieve a tenant of liability to pay rent upon any portion of the premises during the continuance of the eviction. *Kuschinsky v. Flanigan*, 170 Mich., 245, 136 N. W., 362, 41 L. R. A. (N. S.), 430, Ann. Cas., 1914A, 1228; *Edmison v. Lowry*, 3 S. D., 77, 52 N. W., 583, 17 L. R. A., 275, 44 Am. St. Rep., 774, and authorities collected in notes under these two cases.. This rule has been recognized in this State in *Olmstead v. Tennessee Fixture & Showcase Co.*, 1 Tenn. Ch. App., 653.

In the cases referred to the tenants were physically dispossessed of a part of their premises. They are cases in which the landlord had entered and placed upon the demised premises building material, structures, or other things which actually dispossessed the tenant of portions of the leasehold estate.

In the case before us there was no actual dispossession. These overflows occurred several times. Plaintiffs in error had to move their goods from the rear of their store to escape the water, the walls were discolored, and the odor was offensive. All the while, however, plaintiffs in error might have occupied their entire premises, although such occupancy of the rear part of the store would have been attended with much inconvenience and subjected their goods to damage. There seems to be no doubt upon their testimony but that plaintiffs in error were seriously damaged, and for such damage they have a proper action. They were not, however, actually evicted from these premises or any portion thereof.

Summarizing the authorities in that State, one of the New York courts has said:

There are a class of cases "where the landlord commits an act or acts of trespass, which interfere, more or less, with the beneficial enjoyment of the premises, but which leaves the demised premises intact, and do not deprive the tenant of any part of them, so that, though he may be injured, he is not thereby dispossessed. Here the rule is, inasmuch as the wrongful act of the landlord stops short of depriving the tenant

of any portion of the premises, that such trespass is no defense against the liability for rent, and the tenant's sole remedy therefor is an action for damages against the wrongdoer." *Johnson v. Oppenheim*, 12 Abb. Prac. N. S. (N. Y.), 449.

See, also, note 17 L. R. A., 276.

"A mere trespass by the landlord upon the demised premises, not intended by him as a permanent amotion or expulsion of the tenant, so as to deprive him of the possession and enjoyment of the premises, may enable the tenant to recover damages, but will not amount to an eviction." Note, 7 Ann Cas., 600.

This court has spoken to the same effect in a suit where a trespass by the landlord was urged as a defense to his claim for rent, saying:

"The right of the plaintiff to recover, however, is supposed to be totally subverted by his entry upon the premises. Such interference, unless the tenant be wholly evicted and expelled from the possession, is not a discharge from payment of the stipulated compensation, but makes the enterer upon his possession a trespasser liable to make satisfaction for the damages in the appropriate action." *Wilson v. Smith*, 5 Yerg. (13 Tenn.), 379, 399.

If the landlord's responsibility for this toilet be conceded, then we think, under the circumstances of this case, plaintiffs in error were entitled to claim a constructive eviction as soon as they surrendered the premises. They did not leave, however, until Sep-

tember 30, 1915. This suit is for rent for the month of September, 1915, which was due September 1, 1915.

As seen before, the premises have to be abandoned by the tenant before he can claim a constructive eviction. 16 R. C. L., 949; 24 Cyc., 1130.

If a constructive eviction occurred in this case, it was on September 30, 1915, when plaintiffs in error moved. The September rent was then overdue thirty days.

"As a general rule, to constitute an eviction a defense to a claim for rent, it must have occurred before the rent claimed became overdue, as it is no defense to an action for accrued rents. And this has been held true, though the rent was payable in advance and the tenant was evicted after the day of payment, but before the expiration of the period for which the rent was so payable." 16 R. C. L., 952.

So in any view of the case, whether the landlord was responsible for the overflow from this closet or not, there was no eviction. There was no actual eviction, because there was no dispossession of plaintiffs in error. They could not claim constructive eviction until they quit the store. Affirmed.

ANTHONY DICKASON v. THE STATE.

*(Jackson. April Term, 1918.)***1. HOMICIDE. Dying declarations. Admissibility.**

The victim of the murder was shot at close quarters with a shotgun, and his wounds were very large and of a desperate nature. He received the wound late in the evening and lived until the following day. The physicians who visited him the following morning informed him that he would have a bare chance for recovery if he submitted to an operation. He protested against the operation; said it was no use; that he was going to die. After some further talk he ceased objecting to the operation and made the statement admitted in evidence. He never at any time manifested any hope, and while the anæsthetic was being administered again protested; said it was useless, and he was going to die. *Held*, the declaration was admissible, since the victim regarded his death as inevitable and imminent at the time he made the declaration, and was without hope of recovery, the bare circumstance that he consented to an operation not indicating that he entertained hope of recovery. (*Post*, p. 603.)

Cases cited and approved: *Smith v. State*, 28 Tenn., 9; *Anthony v. State*, 19 Tenn., 265; *Baxter v. State*, 83 Tenn., 657.

2. HOMICIDE. Dying declarations. Sense of impending death. How shown.

The sense of impending death may be shown by the language of deceased, or inferred from the character of the wound, or set up by the testimony of physicians or other attendants. (*Post*, p. 605.)

Cases cited and approved: *Brakefield v. State*, 33 Tenn., 215; *Logan v. State*, 28 Tenn., 24; *Nelson v. State*, 26 Tenn., 542.

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3. HOMICIDE. Dying declarations. Admissibility. Question for court.

The admissibility of dying declarations is a question for the court. (*Post*, p. 606.)

Case cited and approved: *Bolin v. State*, 77 Tenn., 516.

4. HOMICIDE. Dying declarations. Admissibility. Question of fact.

The competency of a dying declaration is ordinarily a mixed question of law and fact. (*Post*, p. 607.)

5. HOMICIDE. Review. Admission of dying declaration.

While the supreme court has the power to review the action of the trial judge in holding a dying declaration admissible, it seldom does. (*Post*, p. 607.)

6. CRIMINAL LAW. Review. Admission of dying declaration.

Where the fact of declarant's condition depends on the credibility of witnesses, great weight is to be attached to the conclusions of the trial judge in holding a dying declaration admissible, and the court on appeal will not reverse, unless there is manifest error. (*Post*, p. 607.)

Cases cited and approved: *Gipe v. State*, 165 Ind., 433; *Swisher v. Com.*, 26 Grt., 963.

7. HOMICIDE. Instruction on dying declaration. Reversible error.

In a prosecution for murder, instruction that dying declaration introduced in evidence was to be considered as the evidence of a witness, *held* reversible error, for a dying declaration is not put on the same plane as testimony of a witness appearing before the jury. (*Post*, p. 607.)

Cases cited and approved: *Still v. State*, 125 Tenn., 80; *People v. Kraft*, 148 N. Y., 631; *State v. Vansant*, 80 Mo., 67; *State v. Dorris*, 51 Or., 136; *State v. Valenchia*, 19 N. M., 113.

Case cited and distinguished: *Poteet v. State*, 68 Tenn., 261; *Jolley v. State*, 130 Tenn., 286.

8. CRIMINAL LAW. Record of divorce suit. Admissibility.

In prosecution for murder, *held*, that the record in a divorce case brought against defendant should not be read to the jury, since

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charges made in the bill were calculated to prejudice defendant's case. (*Post*, p. 619.)

9. **CRIMINAL LAW.** Exception to dying declaration. Review.

Where exception below challenged entire dying declaration, most of which was competent, assignment of error as to part of declaration will be overruled on appeal, since incompetent portions should have been specifically pointed out. (*Post*, p. 610.)

FROM TIPTON,

Error to the Circuit Court of Tipton County.—S.
J. EVERETT, Judge.

JNO. A. TIPTON and SIMONTON & GWINN, for plaintiff
in error.

W. H. SWIGGART, JR., Assistant Attorney-General,
for the State.

MR. JUSTICE GREEN delivered the opinion of the
Court.

The plaintiff in error was indicted for the murder of Vesper Granderson. He was found guilty of murder in the second degree, and has appealed in error to this court.

We express no opinion on the facts of the case since it must be reversed and remanded for a new trial for certain errors of law occurring below.

The action of the trial court in admitting a statement of Granderson, made just prior to his death, as

a dying declaration is vigorously assailed by counsel for plaintiff in error.

Granderson was shot at close quarters, with a shotgun, in the abdomen. His wound was very large, of a desperate nature, and the intestines were exposed and protruded. He received this wound late in the evening and lived until the following day. A doctor was summoned on the night of the shooting and visited Granderson and made an examination. The doctor administered a dose of morphine on this visit, but did nothing further at that time. He returned with another physician the following morning. They again examined Granderson, and concluded that he had no chance whatever to recover, unless an operation was performed upon him. They thought that he had a mere chance for recovery if an operation was performed—about one chance in a thousand, as the physicians expressed it.

The doctors told Granderson that he would have a bare chance for recovery if he submitted to an operation. He protested against the operation; said it was no use; that he was going to die. After some further talk he ceased objecting to the operation and made the statement admitted in evidence. He never at any time, however, manifested any hope, and while the anæsthetic was being administered again protested; said it was useless, and he was going to die.

It is urged by counsel for plaintiff in error that these circumstances indicate that Granderson had not relinquished hope of recovery. It is said that other-

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wise he would not have permitted the operation, and it is submitted that unless the declaration was made when the declarant was without any hope of recovery and believed death imminent and inevitable, such declaration is not competent.

The rule of evidence relied on by plaintiff in error is well established in this State. *Smith v. State*, 9 Humph. (28 Tenn.), 9; *Anthony v. State*, Meigs (19 Tenn.), 265, 33 Am. Dec., 143; *Baxter v. State*, 15 Lea (83 Tenn.), 657, and other cases.

We think, however, this rule is not applicable to the facts before us. We believe that Granderson regarded his death as inevitable and imminent at the time he made the declaration, and that he was without hope of recovery.

The sense of impending death may be shown by the language of the deceased, or inferred from the character of the wound, or set up by the testimony of physicians or other attendants. *Baxter v. State*, supra; *Anthony v. State*, supra; *Smith v. State*, supra; *Brakefield v. State*, 1 Sneed (33 Tenn.), 215; *Logan v. State*, 9 Humph. (28 Tenn.), 24; *Nelson v. State*, 7 Humph. (26 Tenn.), 542.

As tending to establish the consciousness of impending dissolution, our cases have attached much importance to the character of the wound.

In the case before us the injuries of the wounded man were of a desperate nature, and he could scarcely have contemplated them with any expectation of life. Moreover, he expressed to the doctors his belief

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that he would die, and did not appear to have any faith whatever in the operation.

We do not think the bare circumstance that a person so wounded agrees to an operation indicates that such person entertains a hope of recovery. The patient is often too weak to resist the suggestion of attendant physicians, or he may yield for the sake of his friends or family. His mere consent to the operation cannot overcome other circumstances strongly indicating his sense of his condition.

There was some controversy among the witnesses below as to the circumstances under which this declaration was made, and this controversy is sought to be reopened here by counsel for plaintiff in error. There was an effort to impeach the testimony of one of the witnesses testifying to the surroundings of deceased and his mental *status* at the time of the declaration.

In this State the admissibility of dying declarations is a question for the court:

“And of this the judge is to determine alone, without the aid of the jury; for the jury shall not hear such declarations till the judge has determined that they are dying declarations, lest, peradventure, they may control their judgment, although, upon hearing other proof, they may become satisfied that they were not dying declarations.” *Smith v. State*, *supra*.

“And that is a question to be determined by the judge, upon proof of the state of mind and condition of the deceased, at the time the declarations were made.” *Brakefield v. State*, *supra*.

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To like effect is *Bolin v. State*, 9 Lea (77 Tenn.), 516.

In *Smith v. State*, supra, this court reversed the action of the trial judge who found that deceased possessed the requisite consciousness of dissolution. This court thought the evidence offered did not warrant the judge in reaching this conclusion.

The competency of a dying declaration is ordinarily a mixed question of law and fact. While this court, therefore, has power to review the action of the trial judge in such a matter, it being merely a question of the admissibility of evidence, we very seldom do so. Where the fact of the declarant's condition depends on the credibility of witnesses examined by the judge, great weight is to be attached to his conclusion. This court will not reverse, unless there is manifest error. Such is the rule in most appellate tribunals. Some hold the action of the trial court conclusive. *Gipe v. State*, 165 Ind., 433, 75 N. E., 881, 1 L. R. A. (N. S.), 419, 112 Am. St. Rep., 238; *Swisher v. Com.*, 26 Grat., 963, 21 Am. Dec., 330; Wigmore on Evidence, section 1442; 1 R. C. L., 537, note, 8 Ann. Cas., 544.

In the course of his charge referring to the dying declaration the court below used this language:

"Such statement or declaration stands before you just as the evidence of any witness examined before you and is to be considered by you just as you would the evidence of any witness introduced on the trial of this cause."

This instruction is made the basis of an assignment of error in this court, and this assignment is well

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taken, and for this error this case must be reversed.

Ordinarily the trial court instructs the jury to receive a dying declaration with caution. There was no such admonition in his honor's charge in this case. While in the absence of a seasonable request the case would perhaps not be reversed for this omission, the portion of the charge quoted is positive error, and warrants a reversal of the case. The language quoted from the charge is not elsewhere qualified therein, and the statements of the declaration have little or no corroboration in the other evidence.

In *Poteete v. State*, 9 Baxt. (68 Tenn.), 261, 40 Am. Rep., 90, this court said:

"Such testimony is subject to many objections and inherent infirmities. The party is not in condition, frequently, to give calm attention to the question to which he makes his statement. It is usually made in the presence of friends whose feelings are excited against the other party against whom they are to be used, and who may easily direct the dying man's attention to the points in the case bearing most heavily on the guilt of the accused, and who will most naturally leave out of view all that tend to a different view. The accused is not present, and has neither an opportunity to make suggestions or call attention to the circumstances in his favor, nor to cross-examine to show inaccuracies of memory, or expose bias from passion or prejudice."

This language was repeated and approved in *Still v. State*, 125 Tenn., 80, 140 S. W., 298.

In *Jollay v. State*, 130 Tenn., 286, 170 S. W., 58, the court quoted and approved the following from Wharton on Criminal Evidence:

“Dying declarations have every element of dramatic evidence. As the last utterances of a sentient, conscious being, standing on the threshold of eternity, they possess an impressiveness out of all proportion to their evidentiary value. In all homicide cases, the elemental passions are at any moment apt to override the judgment. A court may be judicial and impartial, and a jury dispassionate, up to the point where the dying declaration is admitted, and then find its impartiality and selfrestraint seriously tried over the recital of the dying declaration.”

So in view of the nature of such testimony heretofore pointed out, we think the court was in error in instructing the jury to treat the dying declaration just as they would the evidence of a witness who appeared before them, and whose testimony was sifted by cross-examination. Such a charge is declared to be erroneous by Mr. Elliott in his work on Evidence, volume 2, section 358. Like instructions have been held to be reversible error in *People v. Kraft*, 148 N. Y., 631, 43 N. E., 80, *State v. Vansant*, 80 Mo., 67, *State v. Dorris*, 51 Or., 136, 94 Pac., 44, 16 L. R. A. (N. S.), 668, *State v. Valenchia*, 19 N. M., 113, 140 Pac., 1119, 52 L. R. A. (N. S.), 157, and other cases collected in note 56 L. R. A., 446.

In *Baxter v. State*, supra, the trial judge instructed the jury that the dying declaration should have the

same force as testimony as if the deceased had given her sworn statement in the form of a deposition.

This was held not to be reversible error. This court said the trial judge only meant that the declarations were to be received as if sworn to, as a deposition is, and this was just the light in which they were estimated; the apprehension of impending death being equivalent to the oath.

The court did not mean to say that a dying declaration was entitled to the same weight as the testimony of a witness appearing before the jury and there cross-examined, but rather was to be weighed as an affidavit. For in previous cases, as above noted, the infirmities of such evidence have frequently been pointed out by this tribunal. Under the great weight of authority a dying declaration is not put on the same plane as testimony of a witness appearing before the jury.

Inasmuch as this case must go back for a new trial, we think it proper to say that the record in the divorce case brought against the defendant should not be read to the jury, as the charges made in this bill are calculated to prejudice his case.

The assignment of error to that portion of the dying declaration said not to be a part of the *res gestae* is overruled. The exception below challenged the entire declaration, most of which is undoubtedly competent. Such an exception cannot be sustained merely because there is some incompetent matter in the declaration. The incompetent portions should have been particularly pointed out. *Baxter v. State*, supra.

For the reasons indicated, the case will be reversed and remanded for a new trial.

HUNT-BERLIN COAL CO. *et al.* v. S. B. PATON.

(Jackson. April Term, 1918.)

1. MASTER AND SERVANT. Injury to third person. Scope of employee's duty.

It was outside the scope of the duty of a yardmaster of a coal company in admitting an employee of a light company to inspect a meter to engage in a dispute with him relative to the demerits of their respective employers in course of which he was provoked into killing the inspector, and, on these facts appearing in an action for his death, the coal company was entitled to a peremptory instruction. (*Post*, p. 616.)

Cases cited and approved: *Turbeville v. Stampe* (1698), Comb., 459; *Nicholson v. Mounsay*, 15 East, 384; *Puryear v. Thompson*, 24 Tenn., 397; *Cantrell v. Colwell*, 40 Tenn., 470; *Smith v. Memphis & Packet Co.*, 3 Tenn. Cas., 265; *Stone Co. v. Pugh*, 115 Tenn., 688; *Knoxville Traction Co. v. Lane*, 103 Tenn., 379; *Eichengreen v. Railroad*, 96 Tenn., 229; *Railroad v. Carter*, 129 Tenn., 463; *Terry v. Burford*, 131 Tenn., 451; *Memphis Street R. Co. v. Stratton*, 131 Tenn., 620; *Nashville & C. R. Co. v. Starnes*, 56 Tenn., 52; *Daniel v. Petersburg R. Co.*, 117 N. C., 592; *Bowen v. Illinois Cent. R. Co.*, 136 Fed., 306; *Johanson v. Pioneer Fuel Co.*, 72 Minn., 405; *Fairbanks v. Boston Storage Co.*, 189 Mass., 419.

Cases cited and distinguished: *McManus v. Crickett*, 1 East., 107; *Texas & Pac. R. Co. v. Scoville*, 62 Fed., 730; *Rounds v. Delaware, etc., R. Co.*, 64 N. Y., 129.

2. DEATH. Self-defense. Question for jury.

In an action for wrongful death, evidence as to self-defense, held to present a question for the jury. (*Post*, p. 622.)

3. DEATH. Self-defense. Law governing.

The law of self-defense in a civil suit is the same as that governing in criminal prosecutions, except that the cause must be de-

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cided on a preponderance of testimony, whereas in criminal prosecutions defendant is entitled to the benefit of a reasonable doubt. (*Post*, p. 622.)

4. DEATH. Wrongful death. Burden of proof.

In an action for wrongful death due to an intentional act, the burden is on plaintiff first to establish his case by sufficient proof, but defendant has the burden of sustaining a plea of self-defense. (*Post*, p. 622.)

Cases cited and approved: *Brooks v. Haslam*, 65 Cal., 421; *Suell v. Derricott*, 161 Ala., 259; *Nichols v. Winfrey*, 79 Mo., 544; *Rutherford v. Foster*, 125 Fed., 187.

5. DEATH. Wrongful death. Self-defense. Instructions.

In an action for wrongful death defended on the ground of self-defense, the court charged that, if the jury should find defendant was not in peril, and it was unnecessary to fire to protect himself, still, if they should find that the situation or happenings were such as to lead a prudent and cautious man to believe he was in danger, even though he were not, the law would not hold him liable. *Held* that failure to prefix the word "reasonably" to the words "prudent and cautious" therein was reversible error, as placing an undue burden on defendant. (*Post*, p. 623.)

6. DEATH. Wrongful death. Self-defense. Instructions.

In an action for death defended on the ground of self-defense, a statement in the charge that, if decedent did not make the assault on defendant which led him necessarily and reasonably to believe that his life was imperiled, or that he was in danger of great bodily harm, he had no right to fire, was erroneous in using the word "necessarily" as conveying to the minds of the jurors the fact that defendant was not warranted in shooting until circumstances were such as to compel him to believe his life was imperiled. (*Post*, p. 624.)

FROM SHELBY.

Hunt-Berlin Coal Co. v. Paton.

Appeal from the Circuit Court of Shelby County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—A. B. PITTMAN, Judge.

MCGEEHEE, LIVINGSTON & FARABOUGH, for plaintiff.

ANDERSON & CRABTREE, for defendants.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

This is an action to recover for the alleged wrongful death of R. L. Paton, in which the Hunt-Berlin Coal Company and one of its employees, W. R. Morehead, are defendants. The deceased was shot and killed by Morehead.

His personal representative procured a favorable verdict and judgment against both defendants, but on appeal the court of civil appeals held that the trial judge should have sustained a motion for peremptory instructions in behalf of the coal company, that a like motion of defendant Morehead was properly overruled, but that there was reversible error in the charge of the court as to Morehead. All parties have petitioned for *certiorari*, complaining of rulings adverse to them in assignments of error.

The facts appear to be as follows:

The coal company was engaged in selling coal, and Morehead was in its employ, as manager of the particular yard at which the trouble with Paton occurred, having full general control also of the lights and the

meters used at that yard, though, according to Morehead's testimony, only to the extent of giving access to those who might have occasion to go in.

Paton was in the employ of the light company, and charged with the duty of inspecting all meters and seeing that they were kept in running condition. The coal company used two of the meters of Paton's employer. Paton went to the plant of the coal company to inspect one of these meters and on making known his business, Morehead opened the door of the building where the meter was located and let him into the building. Morehead says that he then asked Paton if there was anything wrong with the meter, observing that a man was sent there every few days; whereupon Paton began to curse, and asked, "What have you got to do with it?" and saying further, "I believe you coal men think we are thieves like all of you coal s— of b—s," in reply to which Morehead said, "I did not come down here to have trouble with you; I don't know anything about you being a thief; I know I am not." Paton then said to him, "Shut up, you black-faced s—— of a b——; you don't know me; I am a Scotchman; I will kill you; I have got a gun; I will kill you;" at which time Morehead turned and walked away, meaning to go to the office to call up the Light Company, and have the meter taken out. He left Paton still working on the meter, and was not expecting him to follow. While he was on his way to the office, however, he heard some one talking behind him, and on glancing around he saw Paton approaching

him running, and then within ten feet of him. When Paton got opposite Morehead, he turned facing Morehead and threw his own hands to his hip pocket, saying, "You black-faced s—— of a b——, I will kill you now," drawing something out of his pocket. This was a meter seal. Morehead testifies that, thinking Paton had a pistol he fired in what he thought was his own self-defense.

There was sent up, as a part of the record, a tool that Morehead says Paton drew, and which he took to be a pistol, which tool, while not greatly resembling a pistol, is of such character as led the court of civil appeals to hold that it was a question for the jury as to whether one would be led, under the circumstances indicated, to so believe. According to the evidence of Morehead, he ceased shooting on Paton's falling, and this is not contradicted.

Morehead testified that he had done nothing more to provoke the trouble; that he was followed by Paton about four hundred feet from the place where the meter was being inspected by Paton.

According to the testimony of a policeman, after Paton was taken to a hospital he made statements as to how the trouble occurred, which corroborated the testimony of Morehead. The policeman testified that Paton, while in the hospital, explained to him that Morehead might have thought that he (Paton) had a "gun," that he in fact had what he called a sealing iron, and also told him that he (Paton) applied vile epithets to Morehead.

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Another witness says that Morehead told him, "That man (referring to Paton) had a gun on him," and that on searching Paton he found on the ground by him the tool referred to, describing it as shiny.

1. As to the petition of the administrator of the deceased:

On the above facts it is contended that the court of civil appeals erred in sustaining the motion for a directed verdict favorable to the coal company, since the dispute and killing was not about the private affairs of those engaged, but about the affairs of their respective employers, and the trouble first arose while Morehead was, it is urged, in the line of his duty at the meter. It is said that when he shot he had the interests of the coal company in mind, and was going to the telephone in furtherance of those interests.

An early conception of common-law judges of the true test of the master's liability for a servant's tort was that of a direct command or direction to do the act; but later this was modified. Lord Holt, who became Chief Justice during the English Revolution of 1688, is said to have been largely instrumental in bringing this about, by discarding that part of the doctrine which required a particular command as the test of liability, and exhausted the rule so as to include the notion of implied or presumed command. *Turbeville v. Stampe* (1698), Comb., 459. He laid down the rule that, where the master sets his servant to prosecute a particular enterprise, he impliedly authorizes the doing of all acts which are reasonably

necessary in accomplishing the end aimed at. The change to constructive command thus wrought in the law of torts was more clearly demarked during the chief justiceships of Lords Kenyon and Ellenborough, and "scope of employment" phrased the general test. *Nicholson v. Mounsay*, 15 East, 384.

When, however, it came to dealing with willful torts of servants, Lord KENYON, in *McManus v. Crickett*, 1 East, 107, an action for driving a chariot against the plaintiff's chaise, ruled that a master is not liable for the willful act of his servant, done without the direction or assent of the master, thus reverting to the old doctrine of particular command in cases involving willful torts. It was said by him:

"It is a question of very general concern, and has been often canvassed, but I hope at last it will be at rest. . . . When a servant quits sight of the object for which he is employed, and without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and his master will not be answerable for such acts."

According to the rule of the earlier American cases, which follow *McManus v. Crickett*, supra, although a master was liable for a servant's tortious act in the scope of his employment, he was not liable for such acts if they were committed by his servant willfully or maliciously, unless the master had ordered or directed them or subsequently adopted or ratified same. This view was based on the theory that when

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a servant commits a willful act he is not acting within the scope of his employment. The dividing line was the willfulness of the act.

This earlier doctrine has now been discarded in nearly every jurisdiction and held to be fallacious in that it makes the mental attitude of the tort-feasor in an act of design the test by which to determine whether he was acting within the scope of his authority from the master.

In *Texas & Pac. R. Co. v. Scoville*, 62 Fed., 730, 10 C. C. A., 479, 27 L. R. A., 179, it was said:

“Strong as was Lord Kenyon’s hope that he had put the question at rest, and reluctant as have been Westminster Hall and the courts of last resort in this country to pass the line he set to terminate the master’s liability, an examination of the cases shows that the most enlightened and conservative courts no longer hold that willful and malicious purpose is *prima facie* a departure from the master’s business.”

How far the former doctrine may have entered into, and how far, if at all, it deflected unduly the course of decision in our early cases of *Puryear v. Thompson*, 5 Humph. (24 Tenn.), 397, *Cantrell v. Colwell*, 3 Head (40 Tenn.), 470, and *Smith v. Memphis & Packet Co.*, 3 Tenn. Cas., 265, we need not stop to inquire. See *Stone Co. v. Pugh*, 115 Tenn., 688, 91 S. W., 199, 4 L. R. A. (N. S.), 804, 112 Am. St. Rep., 881.

We believe, however, that the later decisions in this and other jurisdictions, aside from some that are erratic, holding that the willful tort of the servant

may be imputed to the master, may be grouped into three classes:

(a) Where the master is under contract, expressed or implied, with the person wronged, or under a law-imposed duty, requiring the master to refrain from mistreatment of him. Into this class fall, for example, assaults upon passengers by railway employees. *Knoxville Traction Co. v. Lane*, 103 Tenn., 379, 53 S. W., 557, 46 L. R. A., 549, and cases in accord.

(b) Where the nature of the employment or the duty imposed on the servant is such that the master must contemplate the use of force by the servant in performance, as a natural or legitimate sequence. Illustrating this class are cases involving assault and homicides by special officers in the master's employ (*Eichengreen v. Railroad*, 96 Tenn., 229, 34 S. W., 219, 31 L. R. A., 702, 54 Am. St. Rep., 833; *Railroad v. Carter*, 129 Tenn., 463, 166 S. W., 593; *Terry v. Burford*, 131 Tenn., 451, 175 S. W., 538, L. R. A., 1915F, 714); assaults by guards employed to protect the master's property (*Memphis Street R. Co. v. Stratton*, 131 Tenn., 620, 176 S. W., 105, L. R. A., 1915E, 704); trainmen protecting their trains from trespassers; servants sent to repossess or take property. It is generally held in such circumstances that the master will be liable though the wrong be done by means of a deadly weapon in the hand of the servant.

(c) Where a dangerous instrumentality is intrusted by the master to the servant, which has capability of harm to the public. Illustrating this class is *Nash-*

ville & C. R. Co. v. Starnes, 9 Heisk. (56 Tenn.), 52, 24 Am. Rep., 297, which involved a locomotive whistle willfully sounded.

It may be that in the development of the law of torts other cases may arise which would call for a distinct classification.

The cases relied upon by the petitioner fall under one of the above heads, when at all sound. *Daniel v. Petersburg R. Co.*, 117 N. C., 592, 23 S. E., 327, 4 L. R. A. (N. S.), 485, so relied upon, was justly criticized in *Bowen v. Illinois Cent. R. Co.*, 136 Fed., 306, 69 C. C. A., 444, 70 L. R. A., 915, and is said by Labatt to be opposed to the general current of authority. 6 Labatt, Mas. & Serv., section 2368a.

The facts of the pending case do not bring it within either of the groups. Morehead was not a guard, and his use of force was something that his employer cannot be held to have fairly had in anticipation.

In *Rounds v. Delaware, etc., R. Co.*, 64 N. Y. 129, 21 Am. Rep., 597, it was said:

“The master is liable only for the authorized acts of the servant, and the root of his liability for the servants’ acts is his consent, express or implied, thereto. . . .

“It seems to be clear enough from the cases in this state that the act of the servant causing actionable injury to a third person does not subject the master to civil responsibility in all cases where it appears that the servant was at the time in the use of his master’s property or because the act, in some general

sense, was done while he was doing his master's business, irrespective of the real nature and motive of the transaction. . . .

"If he is authorized to use force against another when necessary in executing his master's orders, the master commits it to him to decide what degree of force he shall use; and if, through misjudgment or violence of temper, he goes beyond the necessity of the occasion, and gives a right of action to another, he cannot, as to third persons, be said to have been acting without the line of his duty, or to have departed from his master's business."

In *Johanson v. Pioneer Fuel Co.*, 72 Minn., 405, 75 N. W., 719, one employed by the defendant to sell coal assaulted a purchaser who came to defendant's place of business. The dispute arose from the employee charging that the prospective purchaser brought sacks too large in an attempt to get more coal than he was entitled to. This the customer denied, whereupon the employee became enraged and assaulted and beat the customer. It was held that in so doing the employee was not acting within the scope of his employment. See, also, *Fairbanks v. Boston Storage Co.*, 189 Mass., 419, 79 N. E., 737, 13 L. R. A. (N. S.), 422, 109 Am. St. Rep., 646.

In the instant case, if that were material, the dispute that led to the homicide was not over any defect in the meter, but one in relation to the relative demerits of the employers of the disputants; and it was in no way within the scope of Morehead's employment to

engage in a debating match, garnished with profanity, or to settle by force the question of the probity or fair dealing of the coal company.

We hold that no error was committed in sustaining the Coal Company's motion for peremptory instructions. While, generally speaking, the question whether the act of a servant is within the scope of his duty is one for the jury, it becomes one for the court in a case such as this.

2. As to the assignments of error under the petition of Morehead, the servant:

It is the insistence of this petitioner that his motion for an instructed verdict should have been sustained because the facts show that he acted in his necessary self-defense.

The law of self-defense applicable in a civil suit is the same as that governing in criminal prosecutions, with the exception that in a civil action the cause must be decided on a preponderance of testimony, whereas in a criminal prosecution the defendant is entitled to the benefit of a reasonable doubt in respect to the defense. 8 R. C. L., p. 779, and authorities cited; 5 C. J., 635.

In an action to recover damages for wrongful death due to an intentional act, the burden of proof is on the plaintiff first to establish his case by sufficient proof; but when there is a plea of self-defense the burden of proof is on the defendant to sustain the plea. *Brooks v. Haslam*, 65 Cal., 421; *Suell v. Derricott*, 161 Ala., 259, 49 South., 895, 23 L. R. A. (N. S.), 996, 18 Ann. Cas., 636, and note; 8 R. C. L., p.

858. A contrary rule in Missouri which puts the burden on the plaintiff to show that the homicide was not justifiable (*Nichols v. Winfrey*, 79 Mo., 544) stands alone, and is severely and justly criticized in *Rutherford v. Foster*, 125 Fed., 187, 60 C. C. A., 129, as obnoxious to a wise and fair administration of justice.

The court of civil appeals ruled, and we think correctly, that the jury was warranted in finding that the sealing iron did not so nearly resemble a pistol as to mislead Morehead. Further, we think the jury may have drawn the inference that Morehead saw Paton at work with that tool at the meter just prior to the shooting. Under the facts the validity of the plea of self-defense was for the jury; and we cannot say that there was no evidence to support its finding of liability on Morehead's part, under the above rules applicable in civil action.

3. As to the assignments of error of the administrator relating to the ruling on the trial judge's charge:

The court of civil appeals held to be reversible error this paragraph in the charge because of the use of the words "prudent and cautious:"

"Even if the jury should find that Morehead was not in peril and that it was not necessary for him to fire in order to protect himself, still, if the jury should find the facts to be that the situation or happenings were such as to lead a prudent and cautious man to believe that he was in danger, even though

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he were not, the law would not hold him liable for firing the shot."

We believe this ruling of the appellate court to be correct. The charge placed an undue burden on Morehead in respect of his defense in not qualifying the indicated words by prefixing the word "reasonably."

The appellate court further held that defendant Morehead was prejudiced by this statement in the charge:

"But if the jury finds that Paton was not making an assault on Morehead which led Morehead necessarily and reasonably to believe that his life was imperiled or that he was in danger of having great bodily harm inflicted upon him, then he had no right to fire."

The use of the word "necessarily" was erroneous; it conveyed to the minds of the jurors the thought that Morehead was not warranted in shooting until the circumstances were such as to compel him to believe that his life was in peril.

It is by no means improbable that the jury would have found in Morehead's favor but for these two paragraphs in the charge.

There being no error, the judgment of the court of civil appeals is affirmed, with a remand for a new trial as to defendant Morehead.

T. C. ASHCROFT *et al.* v. LEO. GOODMAN.

SAME v. W. T. McLAIN.

(Jackson. April Term, 1918.)

1. **CONSTITUTIONAL LAW. Officers. Removal from office. Proceedings. "Vacate." "Vacancy."**

Under ordinance providing that all officers of the city shall attend the regular meetings of the council, that any officer desiring to be temporarily absent shall apply to the mayor for leave, and that any officer who is absent without permission of the mayor shall thereby vacate his office, members of a board of commissioners could not, for temporary absence from the city without written authority of the mayor, be deprived of their offices without trial and opportunity to be heard, in view of constitutional guaranty of due process of law, since the word "vacate" cannot be given its technical meaning, the term "vacancy," as used in legal phraseology, meaning a place unfilled, and, when applied to an office, meaning the state of being destitute of an incumbent or a want of a proper or legally qualified officer to officiate. (*Post*, p. 628.)

Cases cited and approved: *Oliver v. Jersey City*, 63 N. J. Law, 634; *State v. Lansing*, 46 Neb., 514; *Richardson v. Young*, 122 Tenn., 471.

Case cited and distinguished: *Connors v. Knoxville*, 136 Tenn., 428.

2. **MUNICIPAL CORPORATIONS. Review of proceedings of city commissioners.**

Common-law *certiorari* was the proper remedy in behalf of members of the board of city commissioners to review proceedings of board to deprive them of office. (*Post*, p. 630.)

3. **MUNICIPAL CORPORATIONS. Certiorari. Extent of relief. "Restitution."**

On *certiorari* to review action of board of city commissioners in depriving members of such board of their offices, a writ of res-
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titution to place such members in their respective offices was not a proper remedy, and the court of civil appeals had no authority to grant such relief, the writ of restitution being unenlarged as to scope by Thompson-Shannon Code, section 4867, the writ of restitution at common law being a remedy whose object was to restore to the appellant that of which he had been deprived by the enforcement of the judgment against him during the pendency of the suit (citing Words and Phrases, Restitution). (*Post*, p. 630.)

Cases cited and approved: *Haebler v. Myers*, 132 N. Y., 363; *Specht v. Central R. R. Co.*, 68 Atl., 785; *Hawkins v. Kercheval*, 78 Tenn., 535.

Case cited and distinguished: *Herrin v. Franklin*, 1 Tenn. Ch. App., 95.

4. **CERTIORARI.** Informal and technical errors.

Writs of *certiorari* and *supersedeas* to review, reverse, and stay execution of decree of court of civil appeals ruling that members of city council had been wrongfully deprived of office and directing issuance of writs of restitution will not be granted, although writ of restitution was without authority; practical justice having been attained, and the issuance of writ of *certiorari* to which the *supersedeas* applied for is dependent being within judicial discretion of the court, to be granted only when necessary to prevent substantial wrong, especially where the matters in controversy are of a public nature. (*Post*, p. 632.)

Case cited and distinguished: *Ramsey v. Hood*, 136 Tenn., 597.

FROM SHELBY

Appeal from the Circuit Court of Shelby County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—
H. W. McLAUGHLIN and J. P. YOUNG, Judges.

In *Ashcroft v. Goodman*:

H. J. LIVINGSTON, City Attorney, for petitioners.

S. P. WALKER, for LeMaster.

C. M. BRYAN and A. WILLIAMS, for defendant.

In *Ashcroft v. McLain*:

H. J. LIVINGSTON, City Attorney, for petitioners,

S. P. WALKER, for Kelley.

C. M. BRYAN and B. E. MOSES, for defendant.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

Application in each of these causes is made by petitioners to the court in session for writs of *certiorari* and *supersedeas* to review, reverse, and stay the execution of decrees of the court of civil appeals, ruling that Goodman and McLain had been illegally deprived of their offices as members of the board of commissioners of the city of Memphis, the governing body of that municipality, and directing that writs of restitution issue to put them in possession of their respective offices.

An effort to deprive these defendants of their offices was made by the other members of the board of commissioners, proceeding under an ordinance quoted below. The circuit court on writs of *certiorari* held the attempt void, and, as stated, the court of civil appeals affirmed the judgments.

The contention of petitioners, the mayor and his fellow commissioners, is that Goodman and McLain were absent from the city without written authority of the mayor, in violation of said ordinance of the city, and that the absences were prejudicial to the interests of the city, and obstructive of the administration of its governmental affairs. It is claimed that it was within the power of the board to declare vacancies on that account and to fill same by electing successors. Successors were elected, and they are petitioners along with the mayor.

We need not determine whether the power to deprive defendants in error of their offices was vested in the quarterly county court of Shelby county, as defendants claim, or in the board of commissioners, as the petitioners assert, since we are of opinion that in either case it was the right of the officers to be tried touching their alleged delinquency on charges preferred, notice, and opportunity to be heard.

If we assume (without deciding) for test purposes that the power was with the board of commissioners, under the following city ordinance, this would be true:

“All officers of the city shall attend the regular meeting of the legislative council; and any officer of the city desiring to be temporarily absent shall apply to the mayor for leave of absence, which may, in the discretion of the mayor, be granted in writing for any time not exceeding thirty days; and any officer being absent without the written permission

of the mayor shall thereby vacate his office, which shall be filled as in case of any other vacancy."

To render this ordinance not impeachable for unreasonableness, it at least would have to be construed to have reference to material or substantial absence; that is such an absence as would amount to official delinquency on the part of the officer complained of. He would have a right to have this inquired into in a proceeding, upon charges preferred, as is set forth in *Connors v. Knoxville*, 136 Tenn., 428, 189 S. W., 870, and cases there cited.

The contention of the petitioners that the ordinance above quoted provides for an automatic vacancy, we think, cannot be sustained. Authority is by them cited to the effect that:

"A vacancy in office, for any of the causes enumerated on the statutes, occurs usually at the time of the happening of the event whose occurrence is by the statute the cause of the vacancy, and no judicial determination that a vacancy has occurred is necessary." 29 Cyc., 1401; *Oliver v. Jersey City*, 63 N. J. Law, 634, 44 Atl., 709, 48 L. R. A., 412, 76 Am. St. Rep., 228; *State v. Lansing*, 46 Neb., 514, 64 N. W., 1104, 35 L. R. A., 124.

In such the vacancy may be filled without judicial determination of the fact. *Id.*

These authorities concern vacancies due to inability of the officer to further fill the office by reason, for example, of removal from the jurisdiction, and not to vacancies claimed to arise because of a delinquency

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on the part of the officer. If the law were otherwise, any alleged act of misfeasance could be made to work a deprivation of office without trial, thus subverting the constitutional guaranty of due process of law.

The word "vacate" in the ordinance cannot be given its technical meaning, and technical vacancies are referred to in the authorities just adverted to. The term "vacancy," as used in legal phraseology, means a place unfilled, and, when applied to an office, it means the state of being destitute of an incumbent, or a want of a proper or legally qualified officer to officiate. *Richardson v. Young*, 122 Tenn., 471. 125 S. W., 664.

We hold, therefore, that in order to a proper determination of whether Goodman and McLain had forfeited their offices by reason of delinquent absences from the city of Memphis, they were entitled to a trial on charges duly preferred with opportunity afforded them to make defense. This, it is conceded, was not done; and the efforts to declare their offices vacant were void under the principles announced in the *Conners Case*; common-law *certiorari* being a proper remedy in their behalf.

We are of opinion, however, that the court of civil appeals did not have authority to support and justify it in issuing writs of restitution directing and requiring the board of commissioners, the petitioners, to restore these officers to the respective offices.

In *Herrin v. Franklin*, 1 Tenn. Ch. App., 95, 106, it was said:

“A writ of restitution is one which issues to restore a party to the possession of property of which he had been wrongfully deprived by some previous order of the same court. . . . The chancery court, as has been well settled, has no power to issue a writ of restitution to supersede a writ or order of the circuit court, which has been previously executed.”

This should be understood to include in the words “same court” an appellate court passing on the same case on review. And this is true though the review be by such a writ of *certiorari*. The general rule is that on annulling the proceedings of a lower court the reviewing court may in its discretion order restitution of that of which the suitor has been deprived wrongfully by reason of illegal orders in the case.

The “writ of restitution” at common law was a remedy whose object was to restore to the appellant that of which he had been deprived by the enforcement of the judgment against him during the pendency of the suit. The court, having taken away, restores that which it ascertains was wrongfully taken.

“It was not created by statute, but was exercised by the appellate tribunal as incidental to its power to correct errors; and hence the court not only reversed the erroneous judgment, but restored to the aggrieved party that which he had lost in consequence thereof. It was usually a part of the judgment of reversal, which directed ‘that the defendant be restored to all things which he has lost on occasion of the judgment aforesaid.’” *Haebler v. Myers*, 132 N. Y., 363, 30 N. E., 963, 15 L. R. A., 588, 28 Am. St. Rep., 589.

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The authorities relied upon by defendants in error go no further than this in cases where the writ of restitution was the common-law writ, unenlarged as to scope by statute. The mention of the writ in Thompson's Shannon's Code, section 4867, is but a recognition of the power as it was exercised at common law; as to which see 34 Cys., 1678; Words and Phrases, "Restitution," citing *Herrin v. Franklin*, *supra*.

We are cited no decision which holds that on *certiorari* to review the action of such a municipal body a writ of restitution is a proper remedy. In *Specht v. Central R. R. Co.*, 68 Atl., 785, in the supreme court of New Jersey (opinion by PITNEY, J.), it appears to be recognized that in procedure by *certiorari* the writ cannot in such a case of its force redress a wrong by way of an affirmative step, a judgment thereunder only operating to nullify what has been wrongfully done by obliterating the record thereof, and to deprive all parties of any justification that may be derived from such record. This we believe to be the proper conception of the scope of power of a judicial tribunal in a revisory proceeding of the character here involved.

In *Hawkins v. Kercheval*, 10 Lea (78 Tenn.), 535, it was held that *mandamus* was the proper remedy to restore one to an office or place from which he had been removed by a municipal body.

It does not necessarily follow, however, that we must disturb the *status* as fixed by the court of civil

appeals when it directed the issuance of writs of restitution. We are fully persuaded by what was asserted and admitted in the argument at the bar in respect to the nature of the absences of the displaced officials that the merits of the case are so clearly with Goodman and McLain that we should not exercise a discretion to grant writs of *certiorari* in order to supersede the erroneous order. As was said in *Ramsey v. Hood*, 136 Tenn., 597, 600, 191 S. W., 129, 130:

“What has been done was erroneously done, because the chancellor had no legal right to order the issuance of a writ of restitution under the circumstances; but it has been done, and practical justice has been attained, and we shall not disturb the result or interfere with the matter further than to tax the complainants with all the costs.”

The issuance of a writ of *certiorari*, to which the *supersedeas* applied for is dependent, is in the judicial discretion of the court, to be granted only when necessary to prevent substantial wrong, especially where the matters in controversy are of a public nature.

“The court will not award the writ, where the errors complained of are merely informal and technical, or where, although there is error in fact, substantial justice has been done, and no appreciable injury has resulted to the complaining party.” 11 C. J., 130.

Application therefor denied.

FENTRESS, J., did not participate in the disposition of the petitions.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
MIDDLE DIVISION

COLUMBIA & BIG BIGBY TURNPIKE CO. v. T. W. ENGLISH.

(Nashville. December Term, 1917.)

1. NEGLIGENCE. Proximate cause. Concurrent causes.

Where two causes proximately contribute to an injury sued for, for only one of which defendant is responsible, and with the other of which neither party is chargeable; defendant must be held liable. (*Post*, pp. 637, 638.)

Cases cited and approved: *Sullivan County v. Ruth & Co.*, 106 Tenn., 85; *Sowles v. Moore*, 65 Vt., 322.

2. TURNPIKES AND TOLL ROADS. Action for injury. Evidence. Negligence. Proximate cause.

In an action against a turnpike company for injury to a traveler passing over a bridge, evidence held to sustain a finding of negligence in failing to fence one side of an approach thereto, and that this contributed as a proximate cause to the injury. (*Post*, pp. 638, 639.)

3. APPEAL AND ERROR. Harmless error. Instructions.

In view of Acts 1911, chapter 32, providing that no verdict or judgment will be set aside and new trial granted unless error complained of has affected the result, there can be no reversal for error, if any, in refusing a charge where it did not affect the result. (*Post*, pp. 638, 639.)

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Acts cited and construed: Acts 1911, ch. 32.

Cases cited and approved: Walrod v. Webster County, 110 Iowa, 349; Gould v. Schermer, 101 Iowa, 582; Strange v. Bodcaw Lumber Co., 79 Ark., 490; Augusta v. Hudson, 94 Ga., 135; Baltimore & R. Turnpike Road v. State, 71 Md., 573; Baldwin v. Greenwoods Turnpike Co., 40 Conn., 238; Ivory v. Deerpark, 116 N. J. 476; Sturgis v. Kountz, 165 Pa., 358; Beopple v. Railroad, 104 Tenn., 420; Coleman v. Bennett, 111 Tenn., 705.

FROM MAURY.

Appeal from the Circuit Court of Maury County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—W. B. TURNER, Judge.

HOLDING & GARNER, for Turnpike Co.

C. P. HATCHER and W. S. FLEMING, for English.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

The plaintiff in error hereinafter called the defendant, was sued by English, hereinafter called the plaintiff, to recover damages for an injury inflicted upon him under the following circumstances:

Defendant was the owner of a covered bridge over a waterway in Maury county. This bridge had an approach of considerable length and height. There was evidence tending to show that there was a de-

fective railing on the south side near the mouth of the bridge; also that there was an open space some twelve feet in length at the end of the railing on the north side, which, in the exercise of due diligence, ought to have been protected by a railing; that between twelve and one o'clock on the night of the injury plaintiff, riding in a buggy, emerged from the bridge upon the approach, and that his horse became frightened at a covered wagon which had fallen over the south side of the approach breaking down the railing that had been there, that the horse, being so frightened, ran along the approach until he reached the open space on the north referred to; that this space was steep and rugged, and, as the result of the horse's running down this declivity, the plaintiff was thrown out and seriously injured. There was evidence to the effect that the covered wagon had been cast on the side of the approach some hours before the defendant passed over the bridge; that from some unknown cause the mules attached to the wagon, which was heavily loaded, became frightened, and backed the wagon over against the railing on the south side and broke it down; that the progress of the wagon down the slope was arrested by the ends of the load, some long pieces of iron or timber, thus suspending the wagon on the side of the approach. There was evidence from which the jury could have inferred, had they been so minded, the impact of the wagon upon the south railing was so violent that it would have broken the railing down even if it had

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been properly constructed. There was also evidence that the deposit of the wagon was so recent that the defendant could not be charged with notice of it, only a few hours having elapsed from the breaking down of the south railing and the passage of the plaintiff and his injury, both having occurred after dark on the same night.

The jury brought in a verdict in favor of the plaintiff for \$7,000 damages. The trial judge suggested a remittitur of \$2,200, which was accepted under protest; then judgment was rendered for the plaintiff for \$4,800; then both sides appealed to the court of civil appeals, and there the judgment was affirmed. Both sides then brought the case to this court by the writ of *certiorari*; the plaintiff complaining of the reduction of the verdict.

Defendant insists that, if the impact of the wagon and team upon the south railing was so violent that it would have broken that railing down even if it had been properly constructed, it could not be charged with the consequences of the wagon's exposure on the side of the approach at the time defendant in error's horse was frightened by it; that is to say, even if defendant was negligent in having failed to erect a proper railing on the south side, that negligence could not be operative as a proximate cause of the fright of the horse, chargeable to him, and hence as one of the proximate causes of the injury so chargeable, if the team of mules forced the wagon back against the railing with such momentum and weight

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that a proper railing would not have withstood it; this violence intervening defendant's negligence and the fright of the horse. *Sullivan County v. Ruth & Co.*, 106 Tenn., 85, 59 S. W., 138; *Sowles v. Moore*, 65 Vt., 322, 26 Atl., 629, 21 L. R. A., 723. Plaintiff in error presented a request in requisite form asking the trial judge to so instruct the jury, which was refused.

Let us assume that this instruction should have been given. Was the refusal to give it a reversible error? We think not. The better rule is that, where there were two causes which proximately contributed to the injury, for only one of which the defendant was responsible, and with the other of which neither he nor the plaintiff was chargeable, still the defendant must be held to answer for the injury inflicted. A few of the authorities in other States sustaining this rule are the following: *Walrod v. Webster County*, 110 Iowa, 349, 81 N. W., 598, 47 L. R. A., 480; *Gould v. Schermer*, 101 Iowa, 582, 70 N. W., 697; *Strange v. Bodcaw Lumber Co.*, 79 Ark, 490, 96 S. W., 152, 116 Am. St. Rep., 92; *Augusta v. Hudson*, 94 Ga., 135, 21 S. E., 289; *Baltimore & R. Turnpike Road v. State*, 71 Md., 573, 18 Atl., 884; *Baldwin v. Greenwood Turnpike Co.*, 40 Conn., 238, 16 Am. Rep., 33; *Ivory v. Deerpark*, 116 N. J., 476, 22 N. E., 1080; *Sturgis v. Kountz*, 165 Pa., 358, 30 Atl., 976, 27 L. R. A., 390. The same rule is recognized in our own State in *Beopple v. Railroad*, 104 Tenn., 420, 58 S. W., 231; *Coleman v. Bennett*, 111 Tenn., 705, 69 S. W., 734.

Say the defendant was not responsible for the wagon's being on the side of the approach, and therefore not chargeable with the fright of the horse; still it was responsible for the failure to fence the part of the northern side of the approach at the place where the horse left it and ran down its steep side, throwing plaintiff from his buggy. Under the evidence the jury was warranted in finding the failure to fence this place was negligence, and that this negligence contributed as a proximate cause to the injury. Therefore, under the rule stated, the defendant was liable for the injury even if innocent of the occurrence which scared the horse. The jury, if properly instructed, could have done no more than find defendant innocent of scaring the horse, yet guilty of producing the accident because of failure to fence the north side. So the error in refusing to charge as requested, if error there was, did not affect the result, and under such circumstances there can be no reversal. Acts 1911, chapter 32.

There was no error in the action of the trial judge and the court of civil appeals entering a judgment for \$4,800. Under the evidence we are satisfied they reached a just result. The judgment of the court of civil appeals must therefore be affirmed.

The plaintiff will pay one-fourth of the costs, and the defendant three-fourths.

COCO COLA BOTTLING WORKS *v.* MRS. WILLIE BROWN
et al.

(Nashville. December Term, 1917.)

1. **HIGHWAYS. Use. Automobiles.**

The general principles applicable to the use of all vehicles upon public highways apply to automobiles in the absence of special statutes regulating their use. (*Post*, pp. 644, 645.)

Cases cited and approved: *Goodman v. Wilson*, 129 Tenn., 464; *Christy v. Elliott*, 216 Ill., 31; *Indiana Springs Co. v. Brown*, 165 Ind., 465; *Tudor v. Bowen*, 152 N. C., 441; *House v. Cramer*, 134 Iowa, 374; *Lauson v. Fond du Lac*, 141 Wis., 57; *Weil v. Kreutzer*, 134 Ky., 563.

2. **HIGHWAYS. Use. Automobiles.**

The right of the driver of a horse and that of the driver of a motor vehicle to use the highway are equal, and each is restricted in the exercise of his rights by the corresponding rights of the other. (*Post*, pp. 644, 645.)

3. **HIGHWAYS. Automobiles. Care.**

An automobile operator must keep his machine always under control so as to avoid collision with other persons using the highway, and cannot assume that the road is clear, and, although he may assume that others will use due care, he is under like duty with respect to every one else. (*Post*, pp. 644, 645.)

4. **HIGHWAYS. Automobiles. Frightening animals.**

Whenever a person operating an automobile knows, or in the exercise of ordinary care should know, that his machine is frightening a horse, or, in the situation in which he has left it, is likely to frighten a horse, he is bound at his peril to exercise due care to prevent an injury. (*Post*, pp. 645, 646.)

5. **HIGHWAYS. Automobiles. Frightening horse. Evidence.**

Where plaintiff's horse was frightened by noise of an automobile engine while the car was halted at side of road, intention of

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the operators to eat their lunches while the car was halted during period of twenty minutes could be considered in determining whether they exercise due care. (*Post*, pp. 646, 647.)

6. **HIGHWAYS. Automobiles. Frightening horse. Gross negligence.**

It was gross negligence to leave the motor of an automobile running while the vehicle was stopped just off the roadway at an elevated point, where horses being frightened might cause damage during a period of twenty minutes while the operators were eating their lunch. (*Post*, pp. 646, 647.)

7. **HIGHWAYS. Automobiles. Frightening horse. Questions for jury. Proximate cause.**

Evidence held to present question for jury whether noise incident to unnecessary running of motor while automobile was stopped was proximate cause of injury to driver of horse frightened by such noise. (*Post*, pp. 646, 647.)

8. **HIGHWAYS. Automobiles. Frightening horse. Questions for jury. Due care.**

Evidence held to present question for the jury whether parking automobile with engine running at narrow elevated point in highway was in the exercise of due care. (*Post*, pp. 646, 647.)

9. **HIGHWAYS. Automobiles. Frightening horses. Liability.**

Noises incident to the proper operation of an automobile are not of themselves evidence of negligence, and, if a horse is frightened at such noises, the operator would not be liable. (*Post*, pp. 646, 647.)

Case cited and approved: *Eichman v. Buchheit*, 128 Wis., 385.

10. **HIGHWAYS. Automobiles. Frightening horse. Assumption of risk.**

The driver of a horse upon the public road assumes the risk of its taking fright at an automobile when operated properly and with due care. (*Post*, p. 647.)

FROM DAVIDSON.

Appeal from the Circuit Court of Davidson County to the Court of Civil Appeals, and by *certiorari*
139 Tenn.—41

Coca Cola Bottling Works v. Brown.

to the Court of Civil Appeals from the Supreme Court.—A. G. RUTHERFORD, Judge.

E. A. PRICE, for the Bottling Works.

BASKERVILLE, COLLIER & MCGLOTHLIN and Wm. A. GUILD, for defendants in error.

MR. JUSTICE LANSDEN delivered the opinion of the Court.

This suit was brought by Mrs. Brown against the plaintiff in error to recover damages for injuries to herself as a result of her horse taking fright at an automobile of plaintiff in error on the Gallatin Pike near Station Camp Creek. It resulted in verdict and judgment for \$3,000, which was affirmed by the court of civil appeals, and the case is before us upon petition of the bottling works for *certiorari*.

Plaintiff avers that she was lawfully driving on the pike from Nashville to Gallatin, and, when she was approaching a bridge in the pike across Station Camp Creek about two miles west of Gallatin, she came upon defendant's truck standing on the west side of the bridge on the south side of the pike with its motor running; that the motor was making a loud, unusual, and unnecessary noise, which frightened the plaintiff's horse as she was trying to pass by the truck. It is shown in the proof that the Nashville and Gallatin Pike at this point upon a fill, and the approach to the bridge referred to in the declaration

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going from Nashville to Gallatin is about one hundred yards long. There are rocks along the edge of the fill from six to eighteen inches high, but there are no banisters or other protection at any other point except at the bridge along which are rails. The mouth of the bridge is twelve feet wide. The retaining wall of the fill nearest Nashville flared from the bridge so as to make the roadbed about thirty feet wide. The traveled part of the road is not so wide upon leaving the bridge as it is when getting on the pike proper. The pike is about twenty-nine feet wide inside of the walls. The fill is from six to nine feet high. The truck was stopped about twelve feet after it had passed over the bridge and was three or four feet from the retaining wall. The truck was about fifty-five inches wide. So it will be observed that, while the truck was twelve feet from the end of the bridge at a point in the pike about twenty-nine feet wide, to one approaching the bridge at some distance it probably had the appearance of standing at or near the mouth of the bridge and occupied a space almost as wide as the bridge. As said, it was three or four feet from one retaining wall and was fifty-five inches wide, and the bridge was only twelve feet wide, making a clearance space between the right-hand side of the truck and the right-hand rail of the bridge of about forty-one inches.

In this position Mrs. Brown was proceeding on the fill in a buggy driving her horse and approaching the truck going toward Gallatin. Her horse was

reasonably gentle and gave no signs of fright at the automobile. It approached the automobile to within ten or fifteen feet, when it suddenly shied and began to back and knocked Mrs. Brown out of the buggy and over the fill, resulting in serious personal injuries.

The drivers in charge of the truck had stopped it at this place for the purpose of taking their lunch and intended for it to remain fifteen or twenty minutes. As a matter of fact, Mrs. Brown saw the truck when it stopped, and in a very few moments after it stopped the accident occurred. There was plenty of room for the buggy to pass the truck, the truck having been turned out of the usual traveled way in the pike. At the conclusion of plaintiff's testimony and all of the testimony, plaintiff in error moved the court to direct a verdict in its favor, and the question chiefly discussed in the petition for *certiorari* is whether the facts stated make a case of liability.

Automobiles have not been regarded by the courts as dangerous things in the sense that extraordinary care in their operation is required by the law. *Goodman v. Wilson*, 129 Tenn., 464, 166 S. W., 752, 51 L. R. A. (N. S.), 1116; 2 R. C. L., p. 1190. The general principles applicable to the use of all vehicles upon public highways apply to automobiles in the absence of special statutes regulating their use. *Christy v. Elliott*, 216 Ill., 31, 74 N. E., 1035, 1 L. R. A. (N. S.), 215, 108 Am. St. Rep., 196, 3 Ann. Cas., 487; *Indiana Springs Co. v. Brown*, 165 Ind., 465, 74 N. E., 615,

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1 L. R. A. (N. S.), 238, 6 Ann. Cas., 656; *Tudor v. Bowen*, 152 N. C., 441, 67 S. E., 1015, 30 L. R. A. (N. S.), 804, 136 Am. St. Rep., 836, 21 Ann. Cas., 646. The right of the driver of a horse and that of a driver of a motor vehicle to use the highway is equal, and each is restricted in the exercise of his rights by the corresponding rights of the other. *Indiana Spring Co. v. Brown*, supra, and note 1 L. R. A. (N. S.), supra. Like all other questions of negligence, the degree of care required of a driver of an automobile is relative and dependent upon the circumstances of each case. 29 Cyc., 415; *House v. Cramer*, 134 Iowa, 374, 112 N. W., 3, 10 L. R. A. (N. S.), 655, 13 Ann. Cas., 461, and note. It is the duty of the operator of an automobile to keep his machine always under control so as to avoid collisions with pedestrians and other persons using the highway. He cannot assume that the road is clear, but he must at all times be vigilant and anticipate and expect the presence of others. *Lauson v. Fond du Lac*, 141 Wis., 57, 123 N. W., 629, 135 Am. St. Rep., 30, 25 L. R. A. (N. S.), 40; authorities supra. While he has the right to presume that both pedestrians and others using the highway will use due care, he is under a like duty with respect to every one else, taking in consideration the character of his vehicle. *Weil v. Kreutzer*, 134 Ky., 563, 121 S. W., 471, 24 L. R. A. (N. S.), 557, and note.

Hence, whenever a person operating an automobile knows, or in the exercise of ordinary care should

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know, that his machine is frightening a horse, or, in the situation in which he has left it, is likely to frighten a horse, he is bound at his peril to exercise due care to prevent an injury. *Indiana Springs Co. v. Brown*, supra.

The operators of the truck in question intended for it to remain at rest fifteen or twenty minutes while they had lunch. It is said for plaintiff in error that their intentions with respect to the truck are not entitled to any weight, because the accident occurred within a few moments after the truck was stopped. But we think the intention of the operators was a proper consideration for the jury in determining whether they were in the exercise of due care. It might not be negligence to leave the engine running when the operator intended to leave the truck at rest for only a short time; but, under all the proof in this case, it would have been gross negligence to leave the motor running fifteen or twenty minutes for the purpose of taking lunch. It was a question properly left to the jury to say whether the noise incident to the unnecessary running of the motor was the proximate cause of the injury, as it was also properly left to the jury to say whether the parking of the truck at this particular place in view of the *locus in quo* was the exercise of due care. Mrs. Brown says that she did not hear the motor until just at the time the horse took fright, and, if she had known that the motor was operating, she would not have tried to drive by the truck. Noises incident to the proper

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operation of an automobile are not of themselves evidence of negligence, and, if a horse is frightened at such noises, the operator would not be liable. *House v. Cramer*, supra; *Eichman v. Buchheit*, 128 Wis., 385, 107 N. W., 325, 8 Ann. Cas., 435. But, as stated before, the proof is abundant that it not only was not necessary, but it was improper for the operators of this truck to leave the motor running while they had lunch. The operators themselves admit this, and deny that the motor was running; but plaintiff's testimony, by which we are bound, shows that it was.

The driver of a horse upon the public road assumes the risk of its taking fright at an automobile when operated properly and with due care. We think there was sufficient evidence upon these points to carry the case to the jury for it to decide whether the proximate cause of Mrs Brown's injury was the natural fright of her horse or the negligence of the operators of the truck. Other questions are made which have been considered and overruled. The result is that the judgment of the court of civil appeals is affirmed, with costs.

SEWANEE FUEL & IRON CO. v. FRED C. LEONARD *et al.*

(*Nashville*. December Term, 1917.)

INTERPLEADER. Who may maintain. Trespass.

Where an admitted trespasser had mined coal on land claimed by two other parties, and both sued, the trespasser could not maintain a bill of interpleader, or a bill in the nature of a bill of interpleader, to determine to whom it was indebted.

Cases cited and approved: *American Tel., etc., Co. v. Day*, 52 N. Y. Sup. Ct., 128; *Morristown First Nat. Bank v. Bininger*, 26 N. J. Eq., 345; *Shaw v. Coster*, 8 Paige (N. Y.), 339; *Slingsby v. Boulton*, 1 Ves. & Bea., 334; *Stephenson v. Burdett*, 56 W. Va., 109.

Case cited and distinguished: *Quinn v. Green*, 36 N. C., 229.

FROM GRUNDY.

Appeal from the Chancery Court of Grundy County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—FOSS H. MERCER, Chancellor.

C. H. GARNER and C. C. MOORE, for appellants.

FULTS & SCHWOON and SPEARS & SPEARS, for defendants.

Fuel & Iron Co. v. Leonard.

MR. JUSTICE GREEN delivered the opinion of the Court.

This was a bill of interpleader filed by the complainant against Fred C. Leonard and others on the one hand, and W. C. Stone and associates on the other hand. Complainant alleged that it had mined certain coal on a thirty-acre tract of land in Grundy county and was indebted either to the one set of parties or the other for the value of this coal; that both parties had sued it, and it filed this bill to compel the claimants to interplead and have their rights determined and to have a decree directing to whom the complainant should respond for the value of the coal taken.

No order was entered in the chancery court sustaining the bill as one of interpleader. On the hearing the chancellor dismissed the bill, but decreed that Stone and associates were the owners of the tract of land involved. The court of civil appeals held that the chancellor was in error in passing a decree in favor of one set of defendants after dismissing the bill of interpleader. That court reversed the chancellor and remanded the case, with directions that the bill be sustained as a bill in the nature of a bill of interpleader and directed further proceedings toward accomplishing the purposes for which the bill was filed.

A petition for *certiorari* has been filed by Stone and associates, and this petition is herewith granted.

We are of opinion that complainant's bill cannot be sustained at all.

It appears from the bill and otherwise in the record that the Sewanee Coal, Coke & Land Company was formerly in possession of the tract of land from which the coal was taken. About the year 1908 this company conveyed a large boundary of land, embracing the tract in question, to the complainant Sewanee Fuel & Iron Company.

Prior to this conveyance, Stone and associates had brought a suit in ejectment against the Sewanee Coal, Coke & Land Company to recover land including that from which the coal was taken. This suit was pending at the time of the deed from the Sewanee Coal, Coke & Land Company to the complainant, and complainant admits actual knowledge thereof.

After the conveyance to the complainant of said land, the coal in question was mined. The complainant avers in its bill that it did not conceive that the ejectment suit against its predecessor in title involved the particular land from which it took this coal, but it is admitted in the bill that it did take coal from land later adjudged by this court, in the suit mentioned, to be the property of Stone and others.

Complainant's bill avers that Leonard and associates are now claiming the ownership of said land under a title which is alleged by Leonard to be superior to the title of Stone and associates. As

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stated before, it was averred in the bill that both sets of claimants had sued the complainant for the value of the coal mined from the thirty-acre tract.

Waiving the old rule of privity, which it was said must exist between defendants, to justify the filing of a bill of interpleader against them, but which is now said to be somewhat relaxed, we are of opinion that this bill cannot be maintained because the complainant, as disclosed by its bill, is a wrongdoer.

It is well settled that a bill of interpleader cannot be sustained where it appears that as to either of the defendants the plaintiff is a wrongdoer. 11 Enc. of Pl. & Pr., 457; 23 Cyc., 9; 15 R. C. L., p. 227; and notes, 35 Am. Dec., 72; 91 Am. St. Rep., 605. We find no case in which a complainant admittedly a trespasser as to both defendants has sought to maintain a bill of interpleader.

A plaintiff liable for conversion cannot interplead a party making the charge with others claiming adversely to him under whom the plaintiff acted. 11 Enc. Pl. & Pr., 458, citing *American Tel., etc., Co. v. Day*, 52 N. Y. Super. Ct., 128.

It has frequently been adjudged that a sheriff who has committed a trespass by levying upon the property of the wrong person cannot maintain a bill of interpleader against the owner and the execution creditor. *Morristown First Natl. Bank v. Bining-er*, 26 N. J. Eq., 345; *Shaw v. Coster*, 8 Paige (N. Y.), 339, 35 Am. Dec., 690; *Quinn v. Green*, 36 N. C. (1 Ired. Eq.), 220 26 Am. Dec., 46.

In *Quinn v. Green*, supra, the court said:

"*Slingsby v. Boulton*, 1 Ves. & Bea., 334, was a bill of interpleader by a sheriff, similar to the present, and on the motion for an injunction Lord Eldon inquired for an instance of such a bill by a sheriff, and, none being cited, he declared the sheriff to be concluded from stating a case of interpleader, because in such a bill the plaintiff always admits a title against himself in all the defendants. He said, "a person cannot file such a bill who is obliged to state that as to some of the defendants the plaintiff is a wrongdoer."

In a case arising in West Virginia, where the complainant had cut certain timber under a contract with one person and another person claimed to own the land and to be entitled to the proceeds of the timber, the right of the party taking the timber to file a bill of interpleader or a bill in the nature of a bill of interpleader was denied. It was held that such a bill could not be maintained if it disclosed, in the event of the establishment of the claim of one defendant, that the plaintiff would stand as to him in the attitude of a trespasser. *Stephenson v. Burdett*, 56 W. Va., 109, 48 S. E., 846, 10 L. R. A. (N. S.), 748.

When a bill shows that the complainant will stand in the attitude of a trespasser as to either defendant, establishing his claim, however the controversy may result, for a stronger reason it cannot be upheld.

In *Stephenson v. Burdett*, supra, the court discusses the difference between a bill of interpleader and a bill in the nature of a bill of interpleader. The

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authorities are reviewed, and it is concluded that there is no difference in the general principles governing such bills, except that a plaintiff with an interest in the subject-matter may maintain a bill in the nature of a bill of interpleader. This seems obviously true.

There appears to be no special equity in complainant's favor. It perhaps did operate without actual knowledge of Leonard's claim to the land, and, although it avers that it mined the coal in ignorance of the fact that the land for which Stone and associates sued its predecessors included the site of its operations, we think such ignorance was not excusable. The pleadings in the case of Stone and associates against the Sewanee Coal, Coke & Land Company must have identified the land with certainty, otherwise this court could not have made a decree adjudicating title to the land to belong to Stone. It is said that the officers and stock-holders of complainant and its predecessor company are the same. Moreover, it purchased pending the suit of Stone and others, which described the land with sufficient precision to enable the court to decree it to them and, notwithstanding actual notice of this suit, took out the coal for the value of which it has since been sued.

Objection to complainant's bill was taken by demurrer of Stone and others. The demurrer was overruled with leave to rely on the same in the answer. There appears to have been no regular hearing of

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the cause, but it was submitted to the chancellor on brief. If the demurrer was not called to the attention of the chancellor in a formal manner, the character of the hearing perhaps will excuse such omission. At any rate, the bill discloses no equity on its face and may very well be dismissed for that reason.

The decree of the court of civil appeals must therefore be reversed, and complainant's bill dismissed at its costs, together with all other proceedings herein.

TOM NAT WEEMS *v.* W. H. NEBLETT.*(Nashville. December Term, 1917.)*1. **BILLS AND NOTES.** Words of negotiability.

A note is not negotiable where it is not payable to bearer or to order. (*Post*, pp. 657, 658.)

2. **BILLS AND NOTES.** Indorsement of nonnegotiable note. "Guarantor." "Indorser."

A person who signed his name on the back of a nonnegotiable note was a "guarantor," and not an "indorser" in the sense of the law merchant. (*Post*, pp. 657, 658.)

Cases cited and approved: *Gilley v. Harrell*, 118 Tenn., 115; *Whiteman v. Childress*, 25 Tenn., 303; *Simpson v. Moulden*, 43 Tenn., 431.

3. **BILLS AND NOTES.** Nonnegotiable note. Consideration for transfer.

The holder of a nonnegotiable note to whom it had been transferred by the payee without consideration therefor cannot recover against a guarantor who became such prior to the transfer. (*Post*, p. 658.)

4. **BILLS AND NOTES.** Nonnegotiable note. Burden of proving consideration.

There is no presumption of consideration for transfer of a nonnegotiable note, and the burden of proving consideration is upon the holder. (*Post*, p. 658.)

FROM MONTGOMERY.

Error to the Circuit Court of Montgomery County.—W. L. Cook, Judge.

Weems v. Neblett.

R. A. GARDNER, for Weems.

CALLIS TATE, for Neblett.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

The following is a copy of the note out of which the controversy arose:

"Eight months after date I promise to pay to Nute Weems the sum of three hundred and seven dollars for one blue mare mule, nine years old and fifteen hands, and one blue horse mule ten years old, fifteen hands, and one spotted cow known as the Ed Davis cow, five years old, and the said Nute Weems holds the full right and title and ownership of said mules and cow until paid in full, with interest from date, this Jan. 1, 1912.

his
" [Signed] H. O. X PERRY.
mark

"Wit. ISAAC WOODS."

Indorsed on back: "NUTE WEEMS,—TOM NAT WEEMS."

After the delivery to the payee but before its maturity, plaintiff in error, Tom Nat Weems, wrote his name on the back of the note, at the request of the payee, to enable the latter to negotiate it to defendant in error, Neblett. It does not appear that the latter gave value for it, or that he gave anything. Being asked on the witness stand, he replied that he did not know what he gave for it. There was no other

evidence on the subject. The suit was brought on the indorsement.

The trial court held plaintiff in error liable, and gave judgment accordingly. This was affirmed by the court of civil appeals.

We think this was error.

The note sued on was nonnegotiable paper because not payable to bearer, or to order. *Gilley v. Harrell*, 118 Tenn., 115, 101 S. W., 424. Therefore when plaintiff in error wrote his name on the back of it, after its delivery to the payee, he did not become an indorser in the sense of the law merchant, but only a guarantor. 2 Dan. Neg. Inst. (6th Ed.), section 1757; 8 C. J., p. 83, section 130, notes 17 and 18. Our cases recognize, in this aspect, a distinction between mere contracts payable in property (as notes payable in current funds and the like were formerly regarded in this State prior to Neg. Inst. Law, section 6), and notes payable in money, which were nonnegotiable only for the want of the use of negotiable words. *Whiteman v. Childress*, 6 Humph. (25 Tenn.), 303, 308-309. Cases therefore like *Simpson v. Moulden*, 3 Cold. (43 Tenn.), 431, and decisions cited therein, concerned with notes payable in things other than money, do not apply. These cases hold in effect that the writing of one's signature on the back of such paper imports no liability. The circumstances under which plaintiff in error wrote his name on the note indicated a purpose to guarantee its payment, aside from the mere fact of so entering his

name on the back of a nonnegotiable instrument, also a paper that had already been delivered to the payee.

However, although we hold that plaintiff in error became a guarantor, yet there can be no recovery against him because it does not appear that defendant in error gave any consideration. A new consideration must be shown. 2 Dan. Neg. Inst. (6th Ed.), section 1760 (2); 8 C. J., p. 83, section 130, n. 19; page 250, section 392, n. 15; and section 344. Neblett's testimony fails to make proof of a consideration, and there was no other. The burden rests on the holder to prove the fact, since there is no presumption of consideration in such a case. *Id.* Plaintiff in error wrote his name on the back of a note which was not only nonnegotiable, but after it had been delivered to the payee, and without any previous contract that he should go upon the note in any form. *Id.*

The judgment of the court of civil appeals must therefore be reversed, and the suit dismissed.

BANK OF BELLBUCKLE v. J. M. MASON *et al.*

(Nashville. December Term, 1917.)

1. PARTNERSHIP. Protest by partner.

At common law, or under Public Acts 1917, chapter 140, where one of two partners notifies a bank that he will not be bound for any overdrafts made by his partner, he is not liable therefor, regardless of where the money is applied, except that he is estopped as to a check drawn by his partner in his behalf, although he had no knowledge that it was an overdraft, because in paying overdrafts over protest, the bank will be held to be doing so solely on the credit of the other partner, and no contractual relation exists between the protesting partner, or the partnership, and the bank. (*Post*, pp. 662-668.)

Cases cited and approved: *Johnston v. Dutton*, 27 Ala., 245; *Campbell & Jones v. Bowen*, 49 Ga., 417; *Johnson, Clark & Co. v. Bernheim*, 76 N. C., 139; *Johnston v. Bernheim*, 86 N. C., 339; *Yeager v. Wallace*, 57 Pa., 365; *Ellis v. Allen*, 80 Ala., 515; *Wilcox v. Jackson*, 7 Colo., 521; *Fertilizer Co. v. Pollock*, 104 Ala., 402; *Monroe v. Conner*, 15 Me., 178; *Leavitt v. Peck*, 3 Conn., 124; *Moffitt v. Roche*, 92 Ind., 96; *Cargill v. Corby*, 15 Mo., 425; *Matthews v. Dare*, 20 Md., 248; *Gallway v. Mathew et al.*, 10 East, 264; *Union Bank v. Day*, 59 Tenn., 413; *Puckett v. Stokes*, 61 Tenn., 443.

Cases cited and distinguished: *Dawson v. Elrod*, 105 Ky., 624; *Matthews v. Dare*, 20 Md., 248; *Johnson v. Rankin*, 59 S. W., 643; *Foster v. Hall*, 23 Tenn., 352.

2. PARTNERSHIP. Contracts. Protest of partner. Sufficiency of notice.

Notice by one of two partners to a bank that checks of his partner must not be paid unless there was money in the bank to the credit of the firm to meet them was sufficient to release such

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partner from liability for overdrafts, although he did not in terms state that he would "not be bound;" it being sufficient if he conveyed clearly and unmistakably that he dissented; that he did not consent to his partner's making overdrafts, but was opposed to it. (*Post*, pp. 668-678.)

Acts cited and construed: Acts 1917, ch. 140.

Case cited and approved: *Gallway v. Mathew*, 10 East, 264.

FROM BEDFORD.

Appeal from the Chancery Court of Bedford County.—WALTER S. BEARDEN, Chancellor.

THOS. L. V. GREER and BATES & COOPER, for the Bank.

RIDLEY & RICHARDSON, for Hoover.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

The complainant sued the defendants as partners composing the firm of J. M. Mason & Co. to recover \$5,505.57 overdraft, together with accrued interest, making the sum of \$6,585.54. A judgment was rendered for the latter sum. Defendant Hoover appealed.

It appears that the defendants were partners in the mercantile business at Bellbuckle. About October, 1912, they fell in debt to the bank by overdraft in the sum of about \$3,000. Hoover was the money-

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ed man of the firm, but did not stay in the store or give any attention to the business, its conduct being confided wholly to Mason, in whom Hoover had the greatest confidence. When the knowledge of the overdraft was brought to the attention of Hoover, he promised to pay it off, but stated to the cashier, Shoffner, that it must never occur again; that Mason's checks must not be paid unless there should be money in the bank to the credit of the firm to meet them. During the next year the firm checks drawn by Mason were from time to time honored until there was an overdraft of the amount sued for. After that time, during the same year, Mason and Hoover dissolved partnership. Shoffner, the cashier of the bank, then brought the overdraft to Hoover's attention, and demanded payment. He refused to pay, and thereupon the present suit was brought. Hoover had no knowledge that the overdrafts were being made, or that his notice to Shoffner was in any respect being disregarded. However, it does appear that before the dissolution of the firm one check for \$500 was drawn by Mason in the firm name in favor of Hoover, and the money paid to him. This was to pay what was supposed to be Hoover's profits that had accrued up to that time. Another check for \$1,400 was paid to Hoover returning to him that sum of money which he had loaned to the firm. These two checks constituted a part of the overdraft sued for. Hoover did not know, at the time he received

the checks, that on their payment they caused any part of an overdraft.

The chancellor rendered a judgment in favor of the complainant bank against Hoover for the full amount of the overdraft, with interest thereon, in all \$6,585.54, and he has appealed to this court.

The best statement of the rule governing the present controversy is found in 20 R. C. L., "Partnership," section 98, as follows:

"Third persons dealing with partners are not affected by private agreements between the partners of which they are not informed, but a partner, while remaining a member of a firm, may place limitations on the authority of his copartner to bind him either generally or as to particular transactions. When a partner gives to a third person notice that he will not be bound by the acts of his copartner, this amounts to notice that the implied agency has ceased, and such partner will then not be bound by the contract entered into by his copartner, although the fruits of the contract have been enjoyed by the partnership of which he is a member."

The authorities are all in accord on the first branch of the rule, and the weight of authority supports the second, to the effect that under the circumstances stated no liability will exist against either the dissenting partner or the firm itself, but only against the member making the contract, although the goods, or money, or other property, as the case may be, were used for the benefit of the firm. The reason is that the dissent of one member of a firm composed of

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only two members (as to firms of three or more see *Johnston v. Dutton*, 27 Ala., 245), with notice to the person proposing to deal with or through the other member rebuts and destroys, for that transaction, the implied agency of the acting member, both as to the dissenting member and the firm. Under such a state of facts the person furnishing the goods or money can do so only on the individual credit of the member dealing with him. If one member of a firm buys goods on his own responsibility and places them in the stock of his firm, or procures money on his own credit, and with it pays the debts of the firm, that cannot raise, in favor of the person furnishing the goods or the money to the acting partner, an indebtedness against the firm, or against a dissenting partner, because of the want of privity between the person furnishing the money to the acting partner and the dissenting partner or the firm. It may raise an indebtedness in favor of the partner who so furnished the money or the goods, restricted in the case of goods, perhaps, to a mere *quantum meruit*, for which he would be entitled to credit on a settlement of the business between his partner and himself; a similar credit for the sum used in the case of money used as stated. But it could not put the dissenting partner or the firm in a contractual relation with the person furnishing the goods or the money to the other partner. There are two cases (*Campbell & Jones v. Bowen*, 49 Ga., 417, and *Johnson, Clark & Co. v. Bernheim*, 76 N. C., 139; *Johnston v. Bernheim*,

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86 N. C., 339) which seem to hold that, if the goods be put into the stock, and used by the firm notwithstanding the known dissent of one of the members, an indebtedness against the firm, and against each member, is created, despite the dissent. If this be a sound conclusion, then the right of dissent does not exist. A dissent by one partner which the other can overrule and set at naught is no dissent at all. The two cases cited, therefore, while conceding the right of dissent in form, deny it in substance and legal effect.

As already intimated, the great weight of authority is the other way. The following illustrations from the cases are deemed useful: Stone belonging to the firm was sold by one member over the protest of the other with knowledge thereof by the purchaser. The sale was held void. *Yeager v. Wallace*, 57 Pa., 365. One partner, over the known dissent of the other, made sale of the whole stock to one creditor, for debts owing to the latter by the firm. This sale was also held void. *Ellis v. Allen*, 80 Ala., 515, 519, 2 South., 676. A similar case is *Wilcox v. Jackson*, 7 Colo., 521, 4 Pac., 966. After one partner had given notice to the plaintiff not to supply any goods to the firm without his order or approval, it was held that he was not liable for goods supplied in defiance of such notice. *Fertilizer Co. v. Pollock*, 104 Ala., 402, 16 South., 138. In full accord is the case of *Dawson v. Elrod*, 105 Ky., 624, 49 S. W., 465, 88 Am. St. Rep., 321. In that case the court said:

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"Likewise it seems clear that notice that the authority to bind did not exist in one partner would relieve from liability the other partner, just as after dissolution he is no longer bound. The partner selling or trading with one partner cannot bind the other partner after notice that he will not be bound. It is notice that the implied agency had ceased. Nor do we think this rule is changed by the fact that the goods came to the firm, and were used by the firm. This might have been the very thing that the appellee did not desire, and the very thing he undertook to guard against; yet, if the acts of his partner, against his wishes and over his protest, in receiving the goods and using them, can bind the appellee to pay for them, then notice to appellant might as well not have been given. The effect of the notice, if given, must be to place the seller on notice that, 'if you sell over my protest, in no event will I be bound.' "

Similarly in *Matthews v. Dare*, 20 Md., 248:

"The adventure may prove a losing one. It seems reasonable that, if a partner can limit the liability by giving notice that he will not be bound, then he can make his known liability absolute at least so far as not to be dependent on whether the thing contracted for comes to the use of the firm. If he cannot, he might as well have not dissented."

A very strong approval of the doctrine is found in *Monroe v. Conner*, 15 Me., 178, 32 Am. Dec., 148.

In *Leavitt v. Peck*, 3 Conn., 124, 8 Am. Dec., 157, it was held that, although a note was executed by one

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of the partners in the name used by the partnership, for goods that had been furnished to the firm, the other partner was not bound on it, when he gave notice to the payee at the time that he would not be bound.

In *Moffitt v. Roche*, 92 Ind., 96, it was held that the note of a firm executed by one partner over the protest of the other, known to the payee, was not binding on the protesting partner. To the same effect is *Cargill v. Corby*, 15 Mo., 425. In *Matthews v. Dare*, 20 Md., 248, it was held that notice by one partner that he would not be bound for future notes or debts contracted by his partner would exonerate him, "unless the plaintiff could prove some act of adoption by him afterwards, or that he derived some benefit from the advance subsequently made to the firm."

Thus far the illustrations have dealt with goods furnished or notes executed. But in *Gallway v. Mathew et al.*, 10 East 264, wherein it appeared that one partner had executed a note and obtained money, the most of which he had applied to the partnership debts, over the dissent of the other, it was decided, the latter could not be held on the note. If money be borrowed or goods bought or any other contract be made by one partner upon his own exclusive credit, he alone is liable therefor, and the partnership, although the money, property, or other contract is for its proper use and benefit, or is applied thereto, will in no manner be liable therefor. Story on Partnership, pp. 211, 215.

On this special point our own cases are in perfect accord.

Thus in *Johnson v. Rankin* (Ch. App.), 79 S. W., 643: "As we have just pointed out, in a contest between the firm and a stranger, the question is not what use was made of the money, but whether it was advanced upon the faith of the partnership. If so advanced, and for a purpose within the scope of the partnership business, the firm is bound, although the money was not in fact appropriated to its use; and, on the other hand, if money was advanced on the individual credit of a member of the firm, its subsequent use for the benefit of the firm would not create an indebtedness against the firm. . . For the same reason it was improper for the chancellor in his directions to the master to make it the sole criterion of the liability of the partnership for the Walker . . . debt and the Brown . . . debt that the moneys derived from these sources were used in, or went to the benefit of, the partnership. The criterion is not the use of the funds for the benefit of the partnership, but their advance by the creditor upon the faith of the partnership business."

So, in *Foster v. Hall*, 4 Humph., 352, 353, it was said: "Nor will it make any difference in such a case that the money has not only been borrowed, but has been applied to partnership purposes."

Again on page 354 of 4 Humph., "Where money is borrowed for a firm, and the individual note, or bill of one partner only, is taken, that partner alone

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will be responsible upon the note or bill; and in order to hold the firm liable for money advanced, it must appear that it was obtained for the firm, and on the credit of the firm; otherwise 'it will be treated as an election by the creditor to absolve the partnership from responsibility, and to confine the credit to that partner only.' "

To the same effect are *Union Bank v. Day*, 12 Heisk. (59 Tenn.), 413, 414, and *Puckett v. Stokes*, 2 Baxt. (61 Tenn.), 443.

Therefore, if what was said in the conversation between defendant Hoover and the bank cashier, Shoffner, was equivalent to a notice by the former that he would not be bound for any future overdrafts made by his copartner Mason, then the bank in permitting such future drafts must be held to have advanced the money solely on the credit of Mason; and Hoover would not be responsible therefor to the bank, although such funds were applied to the payment of the partnership debts, unless there was some concurrent act, or subsequent act, on the part of Hoover showing an adoption of Mason's act, some personal participation in the fruits of it, distinguishable from the mere application of the proceeds to the debts of the firm.

We do not think it is essential that the dissenting partner shall in terms state "that he will not be bound." It is sufficient if he convey clearly and unmistakably to the person or persons proposing to deal with the other partner that he dissents; that he

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does not consent to his partner's making the deal in question, but is opposed to it. This conveys notice to the party that the general implied agency of the other partner does not exist as to the matter; in short, that he has no authority from the dissenting partner to bind him in such matter. In *Parsons on Partnership*, section 84, it is said:

"If the act of the partner be forbidden by his co-partner, and notice is given to the person with whom he deals, he no longer acts as his agent, and his act is only his own."

In *Lindley on Partnership* it is said:

"A person who has notice that the authority of a partner is restricted cannot hold the firm liable if he chooses to deal with that partner in a matter beyond his authority as restricted. Therefore, where the defendant, who was in a partnership, sent the plaintiff notice telling him not to supply goods to the firm without defendant's written order, and the plaintiff, notwithstanding, supplied goods to defendant's partner, it was held that the defendant was not liable." *Id.*, vol. 1, section 170.

In *Yeager v. Wallace*, *supra*, *Ellis v. Allen*, *supra*, and *Wilcox v. Jackson*, *supra*, *Moffitt v. Roche*, *supra*, and *Cargill v. Corby*, *supra*, notice was given to the person dealing with the other partner singly, that the dissenting partner objected to the deal, was opposed to it, protested against it.

Did Hoover subsequently, or pending the creation of the debt representing the overdraft, do anything

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whereby he was estopped on his former objection? Nineteen hundred dollars of the overdraft was paid to Hoover himself, on checks drawn by the firm in his favor. As to this sum, of course, he is estopped, and judgment must be rendered against him, with interest from the filing of the bill. He had no knowledge of the fact that his firm was at the time overdrawing its account; nor, indeed, had he such knowledge until about the time the present bill was filed, but, as he received the money personally, he must return it. He should not be held responsible, however, for the rest of the overdraft. This, after the notice given to the cashier, must be regarded as having been advanced wholly on the credit of the other partner Mason. Hoover had no knowledge of the matter at all.

It results that the decree of the chancellor must be modified in the particular just stated, reducing the amount of the decree to the amount stated, and in other respects reversed. The complainant will pay two-thirds of all of the costs of the cause, and the defendant Hoover one-third.

It is not improper to note that in the uniform partnership law, adopted by several of the States of our Union, and by our General Assembly of 1917 (Acts of 1917, chapter 140), the common law on the subject of the agency of partners *inter sese* was adopted, in substance, as we have stated it in the present opinion. *Id.*, section 9. The hardship assumed to exist in the concurring opinion is met in section 18, subsec. "b,"

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of that act, just as the common law met it, and as we have indicated the common-law rule in the foregoing opinion.

MR. JUSTICE WILLIAMS, J. I concur in the result reached in the above opinion, and in all the argumentation that is necessary in the disposition of the cause; but the grounds of concurrence are stated in order to put on record the fact that I do not agree to the soundness of *Gallway v. Mathew*, 10 East, 264, and the fact that the court is not committed as to what would be the true rule applicable in a case where, after the protest of Hoover, the bank had honored a check creating an overdraft and the proceeds had been applied by Mason on debts of the firm, already in existence to the payment of which Hoover was at the time irrevocably bound. No implication of such committal of the court is to be drawn for the reason that we are all of opinion that the burden is upon complainant bank to show that such debts were paid, and the burden is not carried further than is indicated by the opinion of the Chief Justice. We have, therefore, no such case to decide.

My view is that, when such a case arises, the protesting partner should be held to respond under the doctrine of implied ratification. The true doctrine, as I conceive, lies midway between the rule in *Gallway v. Mathew*, and the doctrine declared by the Georgia and North Carolina courts, if indeed *Gallway v. Mathew* can be construed to treat of or disregard the doctrine of implied ratification in such circum-

stances. It does not do so in terms; and since its date (1808) many rules of the common law have so far been affected by the ameliorating influence of equitable principles that it is well to pause and ask: Would Lord Ellenborough have pronounced the judgment he did, had that influence been more fully operative in his day?

It is entirely logical to hold, as was held in that and many later cases, that upon the lodgment of the protest the implied agency of Mason ceased. But, notwithstanding, there may be a ratification on Hoover's part raised by the law out of the after-occurring facts touching the use of the funds.

I do not think this implication should be raised where the money so advanced by a third person, whether upon a note, bill of exchange, or check, is used in a way that augments, or tends to increase, the hazard of the protesting partner. For example, where goods are purchased and received into the firm's stock of merchandise over one partner's protest, there should be no implication of ratification by him, since, with the benefit accruing in the *pro tanto* swelling of the firm's assets, there would be a concomitant hazard—that of an over-stocking which may bring or tend to bring the firm into difficulties which the protesting partner had a right to hedge against. It seems that the doctrine of ratification is carried too far by the Georgia and North Carolina courts in such a case.

But what can be said against that doctrine when limited to cases where there is no semblance of an

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increase of the burden or risk of the protesting partner? If Mason had used the proceeds of the overdraft to pay a debt of the firm to one who at the time could have pursued Hoover, the protesting partner, how was the latter injured. Assume that the overdraft was used to pay a judgment which was a lien on the firm's property; can it be conceived that Hoover did not take a benefit without any incidental burden or hazard? It would be grossly inequitable for him to retain that benefit without having imposed on him by law a ratification; cancellation of precedent agency authority in Mason being fully granted. Hoover's real *status* would not be changed; no sort of detriment to him would be worked, and substance would be lacking in any defense he might urge.

Hoover is held to respond to the bank; for so much of the overdraft as is represented by the firm's checks to him honored by it, or to the extent he participated as an individual in the benefits of the overdrafts, on this principle, albeit denominated an "estoppel." By parity of reasoning he should be held to answer to the extent of existing debts, which at the time were binding upon him, if satisfied by the overdrafts.

Since the proof only shows, in a general way, that the moneys or credits obtained by the overdrafts were used in the ordinary run of the firm's business, and does not affirmatively show that debts already created were discharged thereby, the bank must fail of recovery further than is stated in the opinion of the Chief Justice.

MR. JUSTICE FENTRESS, J., joins in this opinion.

SAM ARNOLD v. THE STATE.*(Nashville. December Term, 1917.)***1. CRIMINAL LAW. Testimony by accused. Rebuttal.**

One accused of assault with intent to murder, having testified in his own behalf, and the State having produced testimony that he offered to pay \$500 if the prosecution were dismissed, should have been allowed in rebuttal to contradict such testimony. (*Post*, p. 676.)

Acts cited and construed: Acts 1887, ch. 79.

Case cited and approved: *Clemons v. State*, 92 Tenn., 282.

2. CRIMINAL LAW. Appeal.

Error in denying him the right so to testify was prejudicial. (*Post*, p. 676.)

FROM BEDFORD.

Appeal from the Criminal Court of Bedford County.—JNO. E. RICHARDSON, Judge.

J. D. MURPHREE, W. P. COOPER and J. M. ANDERSON,
for Arnold.

JOSHUA BARTON, Assistant Attorney-General, for
the State.

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MR. JUSTICE LANSDEN delivered the opinion of the Court.

The plaintiff in error was convicted of assault with intent to commit murder in the second degree upon the body of one D. H. Sneed. He has appealed to this court and assigned errors. There was much testimony for the State and for the plaintiff in error tending to show guilt and self-defense upon the part of each. The prosecutor Sneed testified in substance, among other things, that plaintiff in error and his attorney came to the office of Sneed's attorney, and there a proposition was submitted to the effect that if Sneed would drop the prosecution plaintiff in error would pay him the sum of \$500. This was in rebuttal. After Sneed had so testified, counsel for plaintiff in error recalled him for the purpose of rebutting this statement of the prosecutor. Upon exception by the State, the trial judge declined to permit plaintiff in error to testify in rebuttal, stating that this court had held in a late decision that a defendant cannot be recalled for any purpose after he has first testified and has been cross-examined and after other witnesses have been introduced. The plaintiff in error would have testified that he did not offer Sneed the sum of \$500 to compromise the case, and made no promise that he would get up the \$500, and that his only proposition was that the case be dismissed and all past differences between him and the prosecutor be settled; whereupon the prosecutor agreed to dismiss the case if Arnold would pay the sum of \$500, which he refused to do.

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We think the refusal of the trial judge to permit plaintiff in error to rebut the statement of the prosecutor by his own testimony was reversible error. No case is cited on the brief of the State holding in substance or to the effect as the learned trial judge seemed to think. The only case cited is the case of *Clemons v. State*, 92 Tenn., 282, 21 S. W., 525. That case is not authority for the holding of the court below. It dealt solely with the case of a defendant testifying in his own behalf under chapter 79, Acts 1887, and referred to his testimony in chief. We think it was not intended by the legislature that a defendant in a criminal case should be permitted to testify in his own behalf and not be permitted to rebut testimony against him which was offered by the State after he had taken and left the witness stand.

Clemons v. State, supra, was the case of a defendant's right to testify at all under the statute. It was held in that case that if he elected to testify in his own behalf, he must do so before any other witness was offered in his defense. This is the express words of the statute allowing him to testify, but it does not refer to rebuttal testimony offered to contradict statements made by the prosecutor or other witnesses for the State after the defendant has been on the stand.

The matter testified to by the prosecutor, and which plaintiff in error was not permitted to rebut, was very material and very injurious to him. For this error, the case must be reversed and remanded for a new trial.

J. W. EVANS *et al.* v. S. R. WILLIAMS.

(Nashville. December Term, 1917.)

1. LICENSES. Occupation tax. Shaving notes.

One who sold cattle at true cash value to a holder of notes which were taken without discount at their face value with interest was not engaged in the business of shaving notes in such transaction, so as to require a license, and could sue on the notes, although he had shaved notes on other transactions. (*Post*, pp. 677-679.)

2. LICENSES. Occupation tax. Burden of proof.

The burden is on one who obtains notes from a holder in exchange for property to clearly show that he was not engaged in the business of shaving notes without a license; the presumption being, in the absence of other evidence, that they were obtained in the exercise of the taxable privilege. (*Post*, pp. 677-679.)

FROM FENTRESS.

Error to the Circuit Court of Fentress County.—
C. E. SNODGRASS, Judge.

J. W. EVANS and L. T. SMITH, for Evans.

CONATSER & WRIGHT, for Williams.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

The defendant in error, Williams, sold to one Pile a lot of cattle at the price of \$750. In payment he

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took from the purchaser sundry promissory notes which he held on other persons, which, with the interest on them to the date of the sale, aggregated the price of the cattle. There was no discount asked or granted on the notes, nor was there any fictitious value placed on the cattle. They were valued as on a cash sale in money. There is no evidence of any effort to evade the statute requiring the payment of a license tax for the business of shaving notes or dealing in securities. The note sued on was one of the notes taken by Williams in the transaction referred to. The defense made was that Williams was engaged in the business of shaving notes, or dealing in securities, and had procured no license, and should therefore be repelled from court. There was evidence that he had shaved notes in some other transactions, sufficient, apparently, to render him liable for the tax; but under the facts of the transaction now under examination, there was nothing to show that it was tainted with his other dealings referred to. We do not think that these facts support a charge of shaving notes, or of dealing in securities. It was a mere case of barter. Of course, in such a matter, where a dealing in securities or the shaving of notes is made the subject of a privilege tax, the burden rests on one who obtains a security from another in exchange for property to show that his transaction falls outside of taxable privileges; the presumption being, on the acquisition of a security from another, in the absence of other evidence, that

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it was obtained in the exercise of the privilege. - The evidence in support of the exemption should be clear and satisfactory. The evidence in favor of the defendant in error attains that degree of certitude.

We think the evidence required should be of the high character indicated because of the temptation, in such matters, to commit frauds on the treasury, and the ease with which, in the absence of such a rule of evidence, it may be accomplished; the facts of each transaction being almost wholly within the control of the parties dealing therein. The court can tolerate no subterfuges. It must be able to see clearly the honesty and fairness of the transaction, and that no fraud on the revenue has been perpetrated.

HENRY MOYE v. THE STATE.

*(Nashville. December Term, 1917.)***1. STATUTES. Subjects and title. Crimes.**

Acts 1915, chapter 125, entitled "An act to require husbands to provide for their wives, . . ." and providing that it is a misdemeanor (a) for any husband to willfully and without good cause neglect or fail to provide for his wife according to his means, and (b) for any husband willfully and without good cause to leave his wife destitute or in danger of becoming a public charge, does not violate Constitution article 2, section 17, providing that no bill shall embrace more than one subject, that subject to be expressed in the title. (*Post*, p. 682.)

Acts cited and construed: Acts 1915, ch. 125.

Constitution cited and construed: Art. 2, sec. 17.

2. CONSTITUTIONAL LAW. Depriving of liberty. Law of the land.

Acts 1915, chapter 125, providing that the judge of the juvenile court shall, if he pleads guilty, bind a husband charged with nonsupport over for the action of the grand jury under bond, should be read in the light of Thompson-Shannon Code, section 6976, providing that no person can be committed to prison for any criminal matter until examination thereof be first had before some magistrate, and the judge before committing an accused to jail for failure to obtain a bond should hear evidence as to the existence of a probable cause of guilt, unless there were a waiver by the accused, and hence the statute does not violate Constitution, article 1, section 8, providing that no person shall be taken or imprisoned or in any manner deprived of his liberty but by the judgment of his peers of the law of the land. (*Post*, pp. 683, 684.)

Acts cited and construed: Acts 1915, ch. 125.

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Code cited and construed: Sec. 6976 (T.-S.).

Constitution cited and construed: Art. 1, sec. 8, (1870).
sec. 8, (1870).

**3. INDICTMENT AND INFORMATION. Wife as prosecutrix.
Nonsupport.**

In view of Thompson-Shannon Code, section 4505, providing deserted wife may sue and be sued, a deserted wife may be prosecutrix on an indictment against her husband for nonsupport under Acts 1915, chapter 125. (*Post*, p. 684.)

Case cited and approved: Cocke v. Garrett, 66 Tenn., 360.

Case cited and distinguished: State v. Travis, 1 Shan. Tenn. Cas., 593.

Code cited and construed: Sec. 4505 (T.-S.).

FROM LAWRENCE.

Appeal from the Circuit Court of Lawrence County.—W. B. TURNER, Judge.

HAMILTON PARKS and J. D. BURCH, for Moye.

WM. H. SWIGGART, JR., Assistant Attorney-General,
for the State.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

Moye was convicted of a misdemeanor in failing to provide for his wife, under Act 1915, chapter 125, and has appealed.

The first contention is that the statute on which the prosecution is based is unconstitutional because it violates that provision of article 2, section 17, of the Constitution of this State which provides that no bill shall become a law which embraces more than one subject, that subject to be expressed in the title.

It is urged that two distinct misdemeanors are defined in the first section of the act: (a) For any husband to willfully and without good cause neglect or fail to provide for his wife according to his means; and (b) for any husband willfully and without good cause to leave his wife destitute or in danger of becoming a public charge. It is said that, there being two misdemeanors, there are two distinct subjects.

The title of the act is as follows:

“An act to require husbands to provide for their wives; declaring it to be a misdemeanor to fail to do so; fixing the penalty therefor and method of procedure in such causes.”

The title purports to deal with but a single misdemeanor, and that a failure on the part of husbands to provide for the support of their wives. The two clauses of section 1 which plaintiff in error insists define two distinct misdemeanors merely state separate manifestations or phases which such a failure to support may present in order to become the offense declared to be the particular misdemeanor. The constitutional provision is not violated.

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It is further contended that the statute is unconstitutional as a whole, or in part at least, because of its violation of article 1, section 8, of the Constitution of 1870, which provides that no person shall be taken or imprisoned or in any manner deprived of his liberty but by the judgment of his peers or the law of the land.

The section of the statute against which the objection is leveled is that which gives the judge of the juvenile court power to bind an accused over for trial:

"If the defendant pleads 'not guilty,' the judge shall bind the defendant over for the action of the grand jury, under bond in a sum not exceeding one thousand dollars, to secure his appearance at the trial." Laws 1915, chapter 125, section 3.

It is argued that this compels the juvenile court judge to bind over and require bond, and that on failure of the defendant to comply he is to be imprisoned, all without a hearing.

The statute does not expressly require a binding over without a hearing. The quoted provision should be read in the light of section 6976, Thompson-Shannon Code, which provides that no person can be committed to prison for any criminal matter until examination thereof be first had before some magistrate. Before committing an accused to jail the juvenile court judge would hear evidence as to the existence of a probable case of guilt as in other cases involving criminal charges, unless there were a waiver by the accused. No constitutional right would be

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denied. It does not appear that defendant was denied such rights.

Another assignment of error is to the effect that the wife appears as prosecutrix on the indictment, and it is urged that a married woman is incompetent to act as prosecutrix against her husband.

It has been held that a married woman who has been deserted by her husband may be prosecutrix on an indictment against a third person. *State v. Travis*, 1 Shan. Tenn. Cas., 593. Since by Thompson-Shannon Code, section 4505, she may sue and be sued for any cause of action accruing subsequently to such desertion, and as if a *feme sole* (*Cocke v. Garrett*, 7 Baxt., 360), we hold that she was a competent prosecutrix in this case. The language of Judge McFARLAND in the Travis Case is peculiarly applicable here:

“A married woman so situated needs the protection of the law afforded by criminal prosecutions against those who commit crimes directly affecting her and her family, and in many cases, unless she is allowed to prosecute, the law would go unexecuted. We think the law should be liberally construed to carry out this object.”

The other assignments of error are disposed of in the judgment, which is one of affirmance.

Shelton v. Wade.

E. C. SHELTON v. C. R. WADE.

(*Nashville*. December Term, 1917.)

APPEAL AND ERROR. Ground for dismissal of Appeal. Failure to make motion for new trial.

Failure to make motion for new trial in the court below was ground for dismissal of appeal, though case was tried by the court without a jury.

Cases cited and approved: Road Commissioners v. Railroad, 123 Tenn., 257; Lancaster v. Fisher, 94 Tenn., 222; Barr v. Railroad, 105 Tenn., 544; State v. Sneed, 105 Tenn., 712; Seymour v. Railroad, 117 Tenn., 98; Barnes v. Noel, 131 Tenn., 126; Bostick v. Thomas, 137 Tenn., 99.

FROM GRUNDY

Appeal from the Circuit Court of Grundy County.
—FRANK R. LYNCH, Judge.

THOS. J. KING, for appellant.

FULTS & SCHNOON, for appellee.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

This case was tried by the circuit judge without the intervention of a jury, and judgment rendered in favor of the defendant in error. The plaintiff in error

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appealed to this court. Motion was made here that the appeal be dismissed because there was no motion for a new trial in the court below.

The motion must prevail. *Road Commissioners v. Railroad*, 123 Tenn., 257, 130 S. W., 768. In opposition to the motion the plaintiff in error refers to *Lancaster v. Fisher*, 94 Tenn., 222, 28 S. W., 1094, *Barr v. Railroad*, 105 Tenn., 544, 58 S. W., 849, and *State v. Sneed*, 105 Tenn., 712, 58 S. W., 1070, prior cases. In the case cited from 123 Tennessee, the court had in mind the three cases just referred to, and clearly intimated its dissatisfaction with the rule so stated and necessarily overruled these cases, but did not deem it necessary to mention them by name. To prevent future misconception, we now overrule these cases on the point in question, and reaffirm the rule laid down in *Road Commissioners v. Railroad*, supra. The principle of this case was followed in *Seymour v. Railroad*, 117 Tenn., 98, 102, 98 S. W., 174, and in *Barnes v. Noel*, 131 Tenn., 126, 131, 174 S. W., 276, and *Bostick v. Thomas*, 137 Tenn., 99, 101, 191, S. W., 968. Since *Road Commissioners v. Railroad* was decided we have uniformly followed the rule there laid down.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
WESTERN DIVISION

JACKSON, APRIL TERM, 1918.

YORK LUMBER & MFG. Co. v. McKNIGHT & MERTZ *et al.*

(*Jackson.* April Term, 1918.)

MECHANICS' LIENS. Lumber used for temporary purposes. Right to lien.

Under Thompson-Shannon Code, section 3531, providing for a lien in favor of one who furnishes material for the building contemplated, plaintiff, who in good faith furnished lumber, believing that it was to be used in a permanent structure, would be entitled to a lien, although the lumber was used in making forms for concrete, and at least seventy-five per cent. was usable at another place on completion of the work for defendants.

Cases cited and approved: Cohn & Goldberg v. Construction Co., 131 Tenn., 445; Daniel & Co. v. Weaver, 73 Tenn., 392; Jonte v. Gill (Ch. App.), 39 S. W., 750.

Code cited and construed: Secs. 3531, 3580 (T.S.).

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FROM MADISON.

Appeal from the Chancery Court of Madison County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—J. W. Ross, Chancellor.

J. T. ROTHROCK, JR., and GEO. & T. W. HARSH, for appellant.

R. F. SPRAGINS, for appellees.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

Lumber, being material that is lienable, as relates to a theater building, under the statute (Thompson's Shannon's Code, section 3531), is the furnisher thereof to be denied a lien by reason of the fact that a temporary and nonconsuming use is made of the lumber in making forms for concrete work, notwithstanding he did not supply the same with knowledge or intent that it would be so used, but, on the contrary, did so under a special contract which looked to the material being wrought into the structure?

In *Cohn & Goldberg v. Construction Co.*, 131 Tenn., 445, 175 S. W., 536, it was held that a furnisher of

lumber for use in the erection of concrete culverts in the making of forms for the concrete work was entitled to a lien upon a railroad under Thompson's Shannon's Code, section 3580, where the lumber was practically consumed or destroyed in that use. There it appeared that the material was sold and delivered by the furnisher for that very use.

Here, the lumber was not practically destroyed or consumed in the work on defendants' premises; only ten per cent. of it being wasted, and fifteen per cent. being damaged, and the furnisher did not have notice that the lumber was to be so used, or utilized otherwise than in the permanent structure.

These facts made applicable the rule announced in *Daniel & Co. v. Weaver*, 5 Lea (73 Tenn.), 392, and in *Jonte v. Gill* (Ch. App.), 39 S. W., 750 (opinion by the present Chief Justice), to the effect that it is not the actual use of lumber in a building by the owner that gives the furnisher a lien, but the furnishing under a contract for that use, and that the lien exists whether the lumber was used or not.

It is not essential that the materials furnished in good faith under a special contract for use in the erection of such a structure be actually used, under Thompson's Shannon's Code, section 3531, providing for a lien in favor of one who furnishes material for the building contemplated.

Therefore the fact that there was only a partial waste or consumption of the lumber, seventy-five per cent. at least of which was usable at another place

on completion of the particular work for defendants, does not avail to prevent a lien attaching.

Both of the lower courts so held. Writ of *certiorari* to bring under review the judgment of the court of civil appeals is denied.

L. B. MCFARLAND v. GEORGE B. BOWLING.

(*Jackson*. April Term, 1918.)

LIMITATION OF ACTIONS. Commencement of suit. Absence from State.

In view of Thompson-Shannon Code, sections 4012, 4007, requiring creditors of a decedent residing within the State to bring suit against the administrator or executor within two years and six months after the qualification of such personal representative, and section 4455, providing that, if the executor or administrator shall be absent from or reside out of the State, the time of such absence or residence shall not be taken as any part of the time limited for the commencement of the action, the running of limitations may be arrested by filing a bill in chancery against an executor, although he is temporarily absent, such filing being the beginning of a suit, even though personal process be not then issued, and hence failure to file such a bill in time bars an action by a creditor against an executor to recover on decedent's promissory note.

Cases cited and approved: *Boro v. Hidell*, 122 Tenn., 80, 89; *Collins v. Ins. Co.*, 91 Tenn., 432; *Cowan, McClung & Co. v. Donaldson*, 95 Tenn., 322; *Litton v. Armstead*, 68 Tenn., 514; *Montgomery v. Buck*, 25 Tenn., 416.

Codes cited and construed: Secs. 4012, 4007, 4455 (T.-S.).

FROM SHELBY.

Appeal from the Circuit Court of Shelby County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—
A. B. PITTMAN, Judge.

McFarland v. Bowling.

FRANK M. GILLILAND and JULIAN C. WILSON, for
McFARLAND.

D. M. SCALES, for Bowling.

MR. CHIEF JUSTICE NEIL delivered the opinion of the
Court.

This was an action brought before a justice of the peace of Shelby county against plaintiff in error as executor of a decedent on two promissory notes. There was a judgment before the justice which was affirmed on appeal to the circuit court of the county. The case was then appealed to the court of civil appeals, where the judgment was reversed. The case then reached us on the writ of *certiorari*.

In the circuit court the plaintiff in error pleaded the two years statute of limitations applicable to actions against executors and administrators on the debts of the decedent. This is commonly called the two years and six months statute, because six months must elapse after the qualification of the personal representative before any action can be brought against him. It was replied that the executor was absent from the State for the period of four and one-half months during the running of the statute. There was evidence that he was absent at various times for one week, two weeks, one month, two months, etc., aggregating four and one-half months. If these absences can lawfully be aggregated and the sum deducted, the suit was brought in time, but otherwise too late, and was thus barred.

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Creditors of a decedent residing within the State must bring suit against the administrator or executor within two years and six months after the qualification of such personal representative. Shannon's Code (Thompson's Ed.), sections 4012, 4007. But there is an exception, which is insisted on in the present case, arising out of a section presently to be cited, viz.: That if the executor or administrator, against whom a cause of action has accrued, "shall be absent from or reside out of the State, the time of his absence or residence out of the State shall not be taken as any part of the time limited for the commencement of the action." Shannon's Code (Thompson's Ed.), section 4455. This exception, however, is not operative if it shall appear that the suit could have been brought in the State notwithstanding the absence of such executor or administrator. *Boro v. Hidell*, 122 Tenn., 80, 89 to 97, 120 S. W., 961, 135 Am. St. Rep., 857. A suit could have been brought against the executor at any time after his qualification and the expiration of the six months, in the chancery court of Shelby county, notwithstanding his temporary absence, simply by filing a bill against him, since in chancery the filing of the bill is the beginning of the suit, and arrests any statute of limitations, even though personal process be not then issued, or until a considerable time thereafter; the beginning of such suit not depending upon the issuance of process, but merely upon the filing of the bill. Shannon's Code (Thompson's Ed.) section 6122; *Collins v. Ins.*

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Co., 91 Tenn. (7 Pick.), 432, 435, 19 S. W., 525; *Cowan, McClung & Co. v. Donaldson*, 95 Tenn. (11 Pick.), 322, 32 S. W., 457; *Litton v. Armstead*, 9 Baxt. (68 Tenn.), 514, 515; *Montgomery v. Buck*, 6 Humph. (25 Tenn.), 416, 418. There having been no obstacle in the way of Bowling's filing such bill during the running of the statutory limitation of two years and six months, and thereby arresting the statute, notwithstanding the brief absences of the executor, and such bill not having been filed, the necessary conclusion is the present action was barred when it was brought after the expiration of the aforesaid limitation period.

We have not considered the question whether short absences of the kind referred to can be cumulated so as to save the bar, but, for the purposes of the present opinion, have assumed that they could be so united, and have reached the conclusion, on the ground stated, that even with this assumption in favor of the defendant in error, the bar was not escaped.

Therefore the judgment of the court of civil appeals, reversing the trial judge and dismissing the suit must be affirmed, with costs.

JOSEPH TOWNSEND v. GEORGE E. NEUHARDT.

*(Jackson. April Term, 1918.)***1. FRAUDS, STATUTE OF. Promise to pay debt of another. Original promise.**

Where the promise of a garnishee to pay plaintiff in garnishment a stated sum to be applied on the judgment if he would continue the case to an agreed date was direct and clear as between the parties, the Statute of Frauds as to answering for the debt of another did not apply. (*Post*, pp. 697-699.)

Cases cited and approved: Lookout Mountain Railroad Co. v. Houston, 85 Tenn., 224-226; Brown v. Bussey, 26 Tenn., 573; Hall v. Rodgers, 26 Tenn., 536; Mills v. Mills, 40 Tenn., 705; Randle v. Harris, 14 Tenn., 508; Tappan v. Campbell, 17 Tenn., 436; Cathcart v. Thomas, 67 Tenn., 172; Rivers v. Thomas, 69 Tenn., 649; Macon v. Sheppard, 21 Tenn., 334; McCarty v. Blevins, 13 Tenn., 195.

2. CONTRACTS. Consideration. Sufficiency.

A garnishee who was desirous of making a trip to another town in company with defendant in the garnishment proceeding offered to pay \$100 to plaintiff if he would continue the case. The object in making the trip was to consummate a deal in coal lands whereby the garnishee expected to profit. *Held*, that the promise was supported by a consideration consisting of the benefit to the garnishee in being able to make the trip regardless of the fact that the expected benefits were not realized. (*Post*, pp. 697-699.)

3. CONTRACTS. Consideration. Forbearance.

Where a plaintiff in garnishment, in consideration of \$100 paid to him by the garnishee, continued the case, the forbearance on plaintiff's part, being a concession of part of his rights, constituted a sufficient consideration for the promise to pay. (*Post*, pp. 697-699.)

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4. CONTRACTS. Consideration. Sufficiency.

To support a contract, the consideration does not have to be adequate; it need only be valuable. (*Post*, pp. 697-699.)

FROM SHELBY.

Appeal from the Circuit Court of Shelby County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—H. W. LAUGHLIN, Judge.

R. H. STICKLEY, for plaintiff.

C. W. ANDERSON, for defendant.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

The defendant in error had a judgment against one Thompson. He caused an execution to be issued on the judgment, and had plaintiff in error summoned as garnishee. The hearing of the garnishment was set for a day in July. At the time plaintiff in error was summoned he and Thompson had in contemplation a trip to be made by the latter to Pennsylvania to consummate a deal in coal lands. Under an agreement between plaintiff in error and Thompson, if the deal went through, the former was to receive \$7,500. He was therefore desirous that Thompson should make the trip. Thompson had also been sum-

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moned for examination in the garnishment proceedings against Townsend, and he could not make the trip if he had to remain for that examination. So, in order to release Thompson for his trip, plaintiff in error promised Neuhardt that he would pay him \$100, to be subsequently credited on the judgment, if he would continue the garnishment hearing to a day in the future agreed upon. The continuance was granted, and Thompson made the trip, but nothing was ever realized. Thereafter plaintiff in error refused to pay the \$100. He was then sued in the present action, and pleaded the statute of frauds, on the ground that the promise was made to answer for the debt, default, or miscarriage of another and was not in writing. He also insisted that there was no consideration. The trial judge rendered judgment against the plaintiff in error. He thereupon appealed to the court of civil appeals, where this judgment was reversed. That learned court held that the contract for the payment of the \$100 was a direct one between the plaintiff in error and the defendant in error, but that it was without consideration. The case was then brought to this court on the writ of *certiorari*.

We are of the opinion that the judgment of the court of civil appeals must be reversed, and that of the trial judge affirmed. The promise certainly was direct and clear from plaintiff in error to the defendant in error. When such is the case, the statute of frauds does not apply. *Lookout Mountain Rail-*

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road Co. v. Houston, 85 Tenn., 224-226, 2 S. W., 36; *Brown v. Bussey*, 7 Humph. (26 Tenn.), 573, 574; *Hall v. Rodgers*, 7 Humph., 536, 540, 541; *Mills v. Mills*, 3 Head (40 Tenn.), 705, 711. The consideration was equally clear. There was a benefit to plaintiff in error in securing the release of Thompson in order that he might make his trip and effect the deal by which plaintiff in error expected to profit to the extent of \$7,500. It is immaterial that the expectation did not eventuate in realization, so far as concerned the receiving of profits, since there was a benefit to plaintiff in error in the opportunity afforded to make the effort to secure the gains which he contemplated. The extent of the benefit is not material so far as the existence of the consideration is concerned.* *Randle v. Harris*, 6 Yerg. (14 Tenn.), 508, 509. Furthermore, the forbearance on the part of defendant in error to press his action under the garnishment proceedings for a stated time was likewise a consideration for the promise. It is true that, when the garnishment proceedings, though instituted on a valid judgment against Thompson, were subsequently decided, it turned out that defendant in error took nothing by them. This, however, cannot lessen the importance of the fact that the forbearance itself was a concession by the defendant in error to the plaintiff in error of a part of his rights, and was therefore to that extent an injury to the former. *Tappan v. Campbell*, 9 Yerg. (17 Tenn.), 436; *Cathcart v. Thomas*, 8 Baxt. (67 Tenn.), 172; *Rivers v*

Townsend v. Neuhardt.

Thomas, 1 Lea (69 Tenn.), 649, 650, 27 Am. Rep., 784. So, in either view, there was a consideration. *Macon v. Sheppard*, 2 Humph. (21 Tenn.), 334, 338. In order to support a contract, the consideration does not have to be adequate; it need only be valuable. *McCarty v. Blevins*, 5 Yerg. (13 Tenn.), 195, 196, 197, 26 Am. Dec., 262.

The foregoing principles fully support the conclusion we have reached.

The result is the judgment of the court of civil appeals must be reversed and that of the trial court affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
EASTERN DIVISION.

KNOXVILLE, SEPTEMBER TERM, 1917

KENNETH B. KENNER *v.* MARY NICE KENNER.

(*Knoxville*. September Term, 1917.)

CONSTITUTIONAL LAW. Parent and child. Rights of parent. Due process of law.

A father has no property right in a child, and a claim that he was deprived of his property without due process of law and without compensation in violation of Const. U. S. Amend. 14, in that by losing its custody in divorce proceedings where he was not personally served with process he was deprived of its services, cannot be considered, although a parent is entitled to damages for value of services of a child unlawfully restrained or injured, and is also entitled to the child's earnings, but cannot compel it to do service for another.

Cases cited and approved: *Barry v. Mercien*, 5 How., 103; *De Krafft v. Barney*, 2 Black, 704; *McKelvy v. McKelvy*, 111 Tenn., 388; *Respublica v. Keppele*, 2 Dall., 198; *Cloud v. Hamilton*, 30 Tenn., 104; *Tennessee Mfg. Co. v. James*, 91 Tenn., 154; *Stewart v. Rickets*, 21 Tenn., 151; *Stringfield v. Helskell*, 10 Tenn., 546; *Burke v. Ellis*, 105 Tenn., 702; *Ex Parte Burrus*, 136 U. S.,

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586; Pennington v. Bank, 243 U. S., 269; De La Montanya v. De La Montanya, 112 Cal., 101.

Code cited and construed: Secs. 4321-4336 (T.-S.).

FROM SULLIVAN.

Appeal from the Chancery Court of Sullivan County.—Hon. Hal H. Haynes, Judge

Opinion on petition to Rehear

L. D. SMITH, C. W. MARGRAVES and S. F. POWEL,
for appellant.

H. H. SHELTON and HARR & BURROW, for appellee.

- MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

The point chiefly stressed is that by the decree in the Alabama suit the complainant was deprived of his property without due process of law, in violation of the Fourteenth Amendment to the federal Constitution, in that by it he was deprived of the services of his child, without having been made a party by personal service of process.

The contention, although put forward with the utmost seriousness, has nevertheless an element of unconscious humor; for it is impossible to perceive how a girl baby less than two years old can perform any services of pecuniary value.

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The real ground depended on, we assume, is that the complainant, by the deprivation of present custody, has lost the possibility of enjoying future services when the child shall have grown old enough to render any, in case it shall live so long. But, as pointed out in the original opinion, there is not necessarily any permanent deprivation, even of custody, since the power to change the custody remains in the Alabama court whenever it shall deem the interests of the child require such change.

Is the right of custody, aside from the child's ability or inability to perform services, such a property right as the Fourteenth Amendment was designed to protect? It is not a right of property. *Barry v. Merrien*, 5 How., 103, 12 L. Ed., 70, 78; *De Krafft v. Barney*, 2 Black. (67 U. S.), 704, 17 L. Ed., 351, 352. The father is the natural guardian, but for nurture only. Differently phrased, he is a trustee for the child, to protect, and rear, and train it for the duties of life. Incidentally, arising out of the duty of nurture, maintenance, and education, he is entitled to its reasonable services. *McKelvy v. McKelvy*, 111 Tenn., 388, 77 S. W., 664, 64 L. R. A., 991, 102 Am. St. Rep., 787, 1 Ann. Cas., 130. But he has no property right in the child. He cannot compel it to do service for another. *Respublica v. Keppeler*, 2 Dall., 198, 1 L. Ed., 347. The cases of *Cloud v. Hamilton*, 11 Humph. (30 Tenn.), 104, 53 Am. Dec., 778, and *Tennessee Manufacturing Co. v. James*, 91 Tenn., 154, 18 S. W., 262, 15 L. R. A., 211, 30 Am. St. Rep., 865, are not opposing authori-

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ties. In these cases there was no involuntary servitude enforced upon the child. Nor do we think such servitude is approved in *Stewart v. Rickets*, 2 Humph. (21 Tenn.), 151. And see *Stringfield v. Heiskell*, 2 Yerg. (10 Tenn.), 546. These were cases arising on apprenticeship, however, in which institution perhaps it may be said a schooling for the child is provided. However, it is to be noted that the sections of the Code, enacted after the decision in *Stewart v. Rickets*, purporting to deal with the whole subject, make no provision for the binding of a child to apprenticeship by the father. Shannon's Code (Thompson Ed.), sections 4321-4336. If any service for another be in fact performed by a child, if there be no emancipation of the child, the compensation belongs to the father. *Burke v. Ellis*, 105 Tenn., 702, 710, 58 S. W., 855. It is also true that, if the father be unlawfully deprived of custody, he may, after a judgment of restoration, obtain compensation for the reasonable value of the child's services during such unlawful restraint. It is also true that, where the child, in the father's custody, is wrongfully injured by another, the father may enforce against such wrongdoer his demand for the reasonable value of the child's services during the disablement. But this right is dependent upon the right of actual custody. If he has lost the custody, and is compelled to seek the aid of a court to regain it, the question will be decided with a view to the best interests of the child. The matter of custody is the real right involved in such cases, and not the de-

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pendent or incidental right to services. But, as stated, the right to the custody of a child is not a property right, nor a right to the custody or control of property. If property, it could not be taken without compensation. Yet all will agree that the father, by the judgment of a court, may be lawfully deprived of the custody of his child without any compensation. The custody may be confided to the mother, where the married pair are living apart, or in disposing of a divorce suit between them, or to a grandfather, or grandmother, or even conferred upon a stranger, if such course be demanded by the child's welfare. This is frequently done under juvenile court acts. What has been said indicates, as we think soundly and truly, how foreign to the relation is any idea or theory of property in the child.

Indeed, the controversy arises solely out of the domestic relation. These matters are regulated by the States, not by the federal government (*Ex parte Burrus*, 136 U. S., 568, 10 Sup. Ct., 850, 34 L. Ed., 500); and they are regulated not on any theory of property, but rest, fundamentally, on the inherent police power of each of the States. It is true that domestic relations may occasionally fall within the sweep of federal power, but only because, as in the case of *Haddock v. Haddock*, cited in the original opinion, a judgment of a State court in respect thereof raises a question under the federal Constitution or laws.

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In addition, it clearly appears, as stated in the original opinion, that the child was taken to Alabama by its mother, and kept there by her during the whole time she was acquiring her domicile in that State. When the divorce bill was filed, after the acquisition of domicile, the child was still in Alabama, and this fact was brought to the attention of the Alabama court in the bill which she filed and in which she prayed that its custody be decreed to her. The child was thus under the jurisdiction of that court, and of no other, just as completely as would be the property of a nonresident found within the jurisdiction, and brought within the control of the court by attachment, as was done in the case of *Pennington v. Bank*, 243 U. S., 269, 37 Sup. Ct., 282, 61 L. Ed., 713, L. R. A., 1917F, 1159, in which a judgment for alimony was sustained, to the extent of the property attached, against a nonresident of the State brought in only by substituted service. There is no means of attaching a child, but when the mother has personal custody of it, and brings the matter to the attention of the court, in her divorce bill, and asks that its custody be decreed to her, the control of the child is as truly placed with the court as is that of property attached in such a suit to secure alimony. We have, in the original opinion cited several cases from the State supreme courts holding that, where children are with the mother in the State where her bill is filed, the courts of that State have jurisdiction to make a decree concerning the custody of the chil-

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dren. Counsel for the petitioner frankly admit they have not been able to find any cases to the contrary. There are many cases that hold the power does not exist where the children are not at the time within the State. The exception confirms the rule. In the California case, *De La Montanya v. De La Montanya*, 112 Cal., 101, 44 Pac., 345, 32 L. R. A., 82, 91, 53 Am. St. Rep., 165, cited in the petition, it appears the children were not within the jurisdiction when the decree of the lower court was pronounced, having been removed by their father, against whom personal service had not been obtained. The general observations made in that case by the judge delivering the opinion are without persuasive authority in the present controversy.

In conclusion we may add, as intimated in the original opinion, not only that the Alabama court acted for the best interests of the child, but we now hold, under the facts presented in this record, that it would not at this time be to the child's interest to deliver its custody to its father. It is less than two years old, is a girl, is in delicate health, and needs the care of its mother. We do not doubt the affection of the father, or forget his evident grief over having lost control of his child, but his claim to sympathetic consideration is much enfeebled by the fact that, while he had the opportunity of defending himself against the charges of cruelty made by his wife in her bill, having received a copy of the bill mailed to him, and having actually employed counsel in Birmingham

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to watch the progress of the case, he would not defend himself, forbade his counsel to enter his appearance, and was content to shield himself behind the fact that he was not technically served within the State of Alabama, thus maneuvering for position or advantage in some future anticipated litigation.

But we have not treated the right he thus reserved as based on a barren technicality. We recognize his privilege under the federal Constitution to so conduct his controversy with the lady who was then his wife. But giving him the benefit of every advantage he thus reserved, we are of the opinion that his claims put forward in the present litigation are without any foundation in law.

There is no merit in the petition, and it must be overruled.

NOTE.—See original opinion page 211 *et sequa supra*. REPORTER.

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ACTIONS—RIGHT AND CAUSE.

1. *Municipal Corporations. Public buildings. Contractor's bonds. Right to sue.*

Though the city had in its hands and due the contractor more than enough money to pay, all labor and material claims, its suit on the contractor's bond, securing both performance and payment of claims, setting up his abandonment of the contract and the additional cost of completion and the liens and claims of labor and materialmen, was not premature. *City of Bristol v. Bostwick*, 304.

2. *Operation. Violation.*

One not the beneficiary of a statute may neither base an action nor defense on a violation thereof. *Chattanooga Ry. & Light Co. v. Bettis*, 331.

3. *Sales. Contracts. Premature suit.*

Under contract authorizing delivery of varying quantity of paper, where the parties disputed the construction, and negotiations were going on, but there had been no absolute and unequivocal refusal to deliver the quantity which the purchaser desired, and the term of the contract had not expired, a suit was premature. *Southern Pub. Ass'n v. Clements Paper Co.*, 429.

4. *Railroads. Injuries to animals. Nature of action.*

Since the statutes do not cover injuries to animals by railroads other than by collision, an action for injuries to mules frightened by a train and injured in a trestle is a common-law action. *N., O. & St. L. Ry. Co. v. Ford*, 505.

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- 1889, ch. 81. Infants. Contracts. Validity. Want of consideration. *Ward v. Sharpe*, 347.
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- 1917, ch. 140. Partnership. Contracts. Protest of partner. Sufficiency of notice. *Bank of Bellbuckle v. Mason*, 659.
- 1917, chs. 295, 479. Counties. Bonds. Validity. *Berry v. Shelby County*, 532.

AGREED STATEMENT.

See APPEAL AND ERROR.

ANIMALS.

 1. *Dogs as property. Common law.*

At common law, dogs were not considered property, the reason given being that they were base in their nature, and kept merely for whim and pleasure. *C., N. O. & T. P. R. Co., v. Ford*, 291.

 2. *Stock laws. Statutes.*

Priv. Acts 1911, chapter 269, providing for lawful fences in Hamilton county, does not repeal by implication Acts 1899, chapter 23, making it unlawful to permit stock to run at large in Hamilton county; the act of 1911 only applying to rural districts in such county, and therefore not covering the same field. *Chattanooga Ry. & Light Co. v. Bettis*, 332.

See RAILROADS.

APPEAL AND ERROR.

 1. *Assignment of error. Sufficiency.*

An assignment, to the effect that the trial court erred in not peremptorily instructing the jury is equivalent to an assignment that there was no evidence to support the verdict. *Southern Ry. Co. v. Lewis & Adcock Co.*, 37.

 2. *Equity cases. Trial de novo.*

While the general rule is that on appeals in chancery the trial is *de novo*, that relates, not to technicalities of procedure, but to the chancellor's decision on the facts, which does not have the same force as a verdict or finding of fact by a court of law sitting without a jury. *Brewer v. De Camp Glass Casket Co.*, 97.

 3. *Presentation of grounds of review in court below. Service of attachment.*

In an action begun by attachment where all of the defendants, including the foreign corporation, appeared, and the parties treated the attachment writ as lawfully levied, contesting only the rights conferred by the levy, objections that there was no

APPEAL AND ERROR.

APPEAL AND ERROR—Continued.

proper writ because no notice of garnishment in writing was left with the defendant garnished, and that there was no publication for the defendants, where made for the first time on appeal, will not be considered, notwithstanding the suit was one in equity. *Id.*

4. *Presumptions. Judgment.*

Where a bill of exceptions incorporating the proof adduced was not preserved, the supreme court must assume that there was sufficient evidence to support the judgment rendered. *Waterhouse v. Furniture Co.*, 117.

5. *Compromise with debtors. Discretion of chancellor.*

In proceeding to wind up affairs of a bank, the chancellor in approving a compromise agreement with the stockholders and directors has a legal and judicial discretion, the abuse of which may be reviewed on appeal. *Knaffl v. Knoxville Banking & Trust Co.*, 240.

6. *Wayside bill of exceptions. Motion for directed verdict.*

A wayside bill of exceptions may be taken, preserving the action of the trial judge in overruling a motion for directed verdict and a motion for new trial based thereon, and errors may be assigned on appeal upon such action, although the jury failed to agree upon and report a verdict. *Oliver Mfg. Co. v. Slimp*, 297.

7. *Trial. Refusing directed verdict. Waiver of errors.*

Error, if any, in overruling motion for directed verdict is not waived by failure to except to a subsequent order restoring the case to the docket for retrial. *Id.*

8. *Motion for new trial. Contents and scope.*

Where the judge on first trial denied a motion for directed verdict, and the jury failed to agree, and he then denied motion for new trial on the ground of error in denying directed verdict, it was not necessary for defendant in his motion for new trial at the last trial to include the failure of the trial judge to award a new trial at the first trial. *Id.*

9. *Constitutional or statutory origin of remedy by appeal.*

The remedy by appeal, unknown to the common law, is wholly of constitutional or statutory origin, and if no right of appeal is given by statute, by express words or necessary implication, no appeal will lie. *State v. Bockman*, 422.

APPEAL AND ERROR.

APPEAL AND ERROR—Continued.

10. *Record. Agreed case. Motion for new trial.*

Where a cause was submitted solely upon an agreed statement of facts, the agreed case because a part of the record without certification by the trial court, and, no bill of exception being required, a motion for new trial was not essential to an appeal. *Johnson v. Furniture Co.*, 580.

11. *Review. Record. Finding of court without request.*

There being no request therefor by either party, a written opinion or finding of facts filed by the trial judge is no part of the record, and the judgment must be treated as a general verdict under a correct charge and affirmed if it may be rested on any theory supported by material evidence. *Weinstein v. Barrasso*, 593.

12. *Homicide. Review. Admission of dying declaration.*

While the supreme court has the power to review the action of the trial judge in holding a dying declaration admissible, it seldom does. *Dickason v. The State*, 601.

13. *Criminal law. Review. Admission of dying declaration.*

Where the fact of declarant's condition depends on the credibility of witnesses, great weight is to be attached to the conclusions of the trial judge in holding a dying declaration admissible, and the court on appeal will not reverse, unless there is manifest error. *Ib.*

14. *Homicide. Instruction on dying declaration. Reversible error.*

In a prosecution for murder, instruction that dying declaration introduced in evidence was to be considered as the evidence of a witness, held reversible error, for a dying declaration is not put on the same plane as testimony of a witness appearing before the jury. *Ib.*

15. *Criminal law. Exception to dying declaration. Review.*

Where exception below challenged entire dying declaration, most of which was competent, assignment of error as to part of declaration will be overruled on appeal, since incompetent portions should have been specifically pointed out. *Ib.*

16. *Death. Wrongful death. Self-defense. Instructions.*

In an action for wrongful death defended on the ground of self-defense, the court charged that, if the jury should find defendant was not in peril, and it was unnecessary to fire to protect himself, still, if they should find that the situation or happenings were such as to lead a prudent and cautious man to believe he was in danger, even though he was not, the law would not hold him liable. Held that failure to prefix the word "reasonably" to

APPEARANCE—ASSIGNMENTS.

APPEAL AND ERROR—Continued.

the words "prudent and cautious" therein was reversible error, as placing an undue burden on defendant. *Hunt-Berlin Coal Co. v.*

17. *Death. Wrongful death. Self-defense. Instructions.*

In an action for death defended on the ground of self-defense, a statement in the charge that, if decedent did not make the assault on defendant which led him necessarily and reasonably to believe that his life was imperilled, or that he was in danger of great bodily harm, he had no right to fire, was erroneous in using the word "necessarily" as conveying to the minds of the jurors the fact that defendant was not warranted in shooting until circumstances were such as to compel him to believe his life was imperilled. *Id.*

18. *Harmless error. Instructions.*

In view of Acts 1911, chapter 32, providing that no verdict or judgment will be set aside and new trial granted unless error complained of has affected the result, there can be no reversal for error, if any, in refusing a charge where it did not affect the result. *Columbia & Big Bigby Turnpike Co. v. English*, 634.

19. *Criminal law.*

Error in denying him the right so to testify was prejudicial. *Arnold v. The State*, 674.

20. *Ground for dismissal of appeal. Failure to make motion for new trial.*

Failure to make motion for new trial in the court below was ground for dismissal of appeal, though case was tried by the court without a jury. *Shelton v. Wade*, 685.

See COURTS.

APPEARANCE.

Stipulations. Demurrer.

Where defendants moved to dismiss a bill and in the alternative demurred, it being stipulated that if the motion should be sustained, the demurrer would not be considered an entry of appearance, the motion being disallowed, defendants must be treated as having appeared. *Brewer v. De Camp Glass Casket Co.*, 97.

ASSIGNMENTS.

Equitable assignment. Discretion of chancellor.

An equitable assignment will be enforced or not in the sound discretion of the chancellor according to justice, but not so as to

ASSUMPTION OF RISK—ATTORNEY'S FEES.

ASSIGNMENTS—Continued.

defeat intervening rights of third persons. *Horn v. Nicholas*, 453.

See ESTOPPEL; LIENS.

ASSUMPTION OF RISK.

See NEGLIGENCE.

ATTACHMENT.

Corporations. Foreign. Service.

Thompson's Shannon's Code, section 4515, declares that in actions commenced by attachment of property without personal service of process the attachment may be sued out or suit brought in any county where the real property lies or any part of the personal property may be found, while section 5211 authorizes an attachment against the property of a nonresident debtor or defendant. Sections 4539-4541, inclusive, provide for institution of actions against corporations either resident or nonresident by service of process on certain designated officers or agents. Acts 1859-60, chapter 89, embodied in Thompson's Shannon's Code, section 4542, declares that where a corporation, company, or individual has an office or agency or resident director in any county other than that in which the chief officer or principal resides, service of process may be made upon any agent or clerk employed therein. Sections 2549 and 4543-4546, respectively, relate to service on foreign corporations having no office or agency in the State and to substitutionary service on foreign corporation not domesticated and having neither property nor localized business. *Held*, that as section 4516, which apparently restricted the scope of service on agents, was enlarged by Acts 1859-60, chapter 89, a foreign corporation may be served by attachment of its property in any county where such property is found, regardless of the fact that its directors and officers reside in another county; this being particularly true where it did not appear that the corporation was at that time doing business in the State so as to render service of process on resident directors and officers valid. *Brewer v. De Camp Glass Casket Co.*, 97.

ATTORNEY'S FEES.

1. *Mortgages. Foreclosure sale.*

Reasonable fees for a mortgagee's or trustee's attorney may be retained out of the proceeds of a foreclosure sale when pro-

ATTORNEY AND CLIENT—BANKS AND BANKING.

ATTORNEY'S FEES—Continued.

vided for in the mortgage. *Carolina Spruce Co. v. Black Mountain R. Co.*, 248.

2. *Pledges. Foreclosure of collateral.*

Where a promissory note, secured by certain mortgage bonds as collateral, provided that after the proceeds of any sale had been applied to the payment of or a credit upon this note, and after deducting costs and attorney fees, should any deficiency remain the maker agrees to pay the same, the provision is for the indemnity of the pledgee against loss, and to enable it to recover the whole debt without being charged with attorney's fees, and if the pledgee should be put to the necessity of overcoming legal obstructions in selling the collateral, attorney's fees may be deducted from the proceeds of the sale. *Id.*

See JUDGMENT.

ATTORNEY AND CLIENT.

1. *Lien for services. Waiver.*

Where an attorney, otherwise entitled to a charging lien on a judgment recovered, takes an assignment to himself of the entire judgment, he abandons or waives his right to enforce the lien; the claim to a lien being merged in the specific assignment of the whole judgment. *Jernigan Bros. v. Hart*, 515.

2. *Lien for fees.*

Attorneys who properly brought a suit for an insane person by his next friend have a lien upon the cause of action for their fees. *Williams v. Gaither*, 587.

AUTOMOBILES.

See HIGHWAYS; NEGLIGENCE.

BANKS AND BANKING.

Compromise with debtors. Discretion of chancellor. Scope of inquiry.

In a proceeding to wind up affairs of bank, where the receiver recommended a compromise, and creditors of the bank by their attorneys advised the compromise, and the master, the chancellor, and the court of civil appeals were in favor of the compromise, it was not an abuse of discretion to order it to be made. *Knaffl v. Knoxville Banking & Trust Co.*, 240.

BENEFICIAL ASSOCIATIONS—BILL OF EXCEPTIONS.

BENEFICIAL ASSOCIATIONS.

1. *Insurance. Fraternal insurance. Exhaustion of remedies.*

A beneficial order or association may validly stipulate that remedies must be exhausted by an appeal to a higher tribunal of the order, provided for the adjudication of claims, though it may not wholly deprive its member of the right to invoke the aid of the court of the land. *Honea v. American Council*, J. O. U. A. M., 21.

2. *Insurance. Fraternal insurance. Exhaustion of remedies.*

Where the right to a funeral benefit against a fraternal order is involved, the beneficiary may sue without appealing to the judicatories within the order, though the by-laws provided for appeals therein, if they did not expressly inhibit suit in the courts before exhaustion of the remedies within the order. *Id.*

3. *Insurance. Fraternal insurance. Right to recover. Time of reinstatement.*

Under by-laws of fraternal order, entitling beneficiary to receive funeral benefits for the death of a member, not caused from any disease which had demonstrated itself prior to his reinstatement, the beneficiary of a member who had been suspended and whose fatal illness demonstrated itself after he applied for reinstatement but before he was finally enrolled on the books of the National Council, could not recover the death benefit. *Id.*

4. *Insurance. Fraternal insurance. By-laws. Construction.*

The laws of a beneficial association or order, by which the members are bound as by contract, are to be liberally construed in favor of the indemnity of the member or his beneficiaries so as to effectuate the benevolent purpose of the order; but the construction must be of the laws as a whole, rather than of a segregated clause, and it must not be a forced one nor one that runs counter to the manifest intention of the contracting parties expressed in unambiguous terms. *Id.*

5. *Insurance. Fraternal insurance. Rights to benefits.*

Where beneficiary of member of fraternal order who had been suspended lost right to recover against national council by delay in enrollment after reinstatement, she could not recover against the local council whose by-laws postponed right to benefits until three months after reinstatement; the member having died before expiration of such time. *Id.*

BILL OF EXCEPTIONS.

See APPEAL AND ERROR.

BILLS AND NOTES.

BILLS AND NOTES.

1. *Actions. Defenses.*

Acts 1907, chapter 602, section 1, declares that all property, real, personal, and mixed, shall be assessed for taxation. Section 8 provides that all personal property of every kind shall be assessed, while subsection 7 specifies for assessment all notes, due-bills, choses in action, accounts, mortgages, or any other evidence of indebtedness. Section 12 requires taxpayers to fill out or cause to be filled out a schedule setting out their property not later than April 20th of each year, while section 14 provides that in any suit upon any note, bill, bond, or other chose in action subject to taxation, it shall be competent for any defendant to allege and show in defense that such note, bill, bond, or other chose in action was not given in, or included in, the owner's assessment for taxation for the preceding year, and upon such defense being established, the owner or holder of such note, etc., shall be taxed with all the court costs of the case, and the court shall declare, in rendering such judgment, a lien in favor of the state for taxes unpaid. *Held*, that in an action on notes not listed for taxation, recovery cannot be denied for that reason, and proof of nonlisting will merely authorize the court to impose payment of costs on plaintiff and the declaration of a lien on the recovery. *Poss v. Albert*, 1.

2. *Taxation. Property taxable. Railty. Rent notes. Nature of.*

Notes executed for rent to accrue are part of the real estate as long as held by the owner and until they mature, and as they would in event of the owner's death pass with the reversion and not as personal property, they need not be listed for taxation as personal property until maturity. *Ib.*

3. *Presumptions. Ownership of note.*

The possession by a third party of a note payable to the order of the payee and not indorsed by him raises no presumption of ownership, and no such presumption is created by Negotiable Instrument Law, section 49 (Thompson's Shannon's Code, section 3516a48), providing that a transfer for value without indorsement vests in the transferee such title as the transferor had, and that the transferee acquires in addition the right the transferor's indorsement, as this contemplates the making of proof of the transfer. *Allen v. Hays*, 56.

4. *Indorser before delivery. Notice of protest.*

One who indorses a note before delivery is entitled to notice of protest. *Waterhouse v. Furniture Co.*, 117.

BILLS AND NOTES.

BILLS AND NOTES—Continued.

5. *Replevin. Right to remedy. Possession.*

Where defendant's agent sold a third person a farm, taking notes, and the agent forged defendant's signature as indorser, pledging the notes as collateral to the bank, and then made new forged notes, exact duplicates of the true notes, which defendant indorsed believing that he had indorsed the genuine notes, the indorsee could not have replevin to recover the true notes; the delivery of the false notes not having been a valid transference vesting legal title in the indorsee in view of Negotiable Instruments Act (Laws 1899, chapter 94) section 16, making a contract concerning a negotiable instrument incomplete until delivery. *Horn v. Nicholas*, 453.

6. *Replevin. Right to writ. Possession.*

Assuming that the indorsee of a false note which both parties thought was the valid note was an equitable assignee, he could not maintain replevin to recover the true note, since one to maintain replevin must show a legal right of possession or ownership as distinguished from such a right recognized in courts of equity. *Ib.*

7. *Estoppel. Purchaser of note. Effect.*

Where the maker of a note took over his own note on which the payee's indorsement was forged, his acts were a mere purchase and he could reissue the note and set up estoppel against one claiming as the payee's assignee on a duplicate note which was forged, except as to the payee's indorsement, when the payee had in writing acknowledged the validity of his indorsement of the note bought by the maker. *Ib.*

8. *Words of negotiability.*

A note is not negotiable where it is not payable to bearer or to order. *Weems v. Neblett*, 655.

9. *Indorsement of nonnegotiable note. "Guarantor." "Indorser."*

A person who signed his name on the back of a nonnegotiable note was a "guarantor," and not an "indorser" in the sense of the law merchant. *Ib.*

10. *Nonnegotiable note. Consideration for transfer.*

The holder of a nonnegotiable note to whom it had been transferred by the payee without consideration therefor cannot recover against a guarantor who became such prior to the transfer. *Ib.*

BONDS—BURDEN OF PROOF.

BILLS AND NOTES—Continued.

11. *Nonnegotiable note. Burden of proving consideration.*

There is no presumption of consideration for transfer of a non-negotiable note, and the burden of proving consideration is upon the holder. (*Id.*)

See REPLEVIN.

BONDS.

1. *Municipal corporations. Public buildings. Bonds of contractors.*

Where contractor on a public building executed a bond for performance and on his telegraphic request, after advice of the city attorney, the surety by wire consented to insert the words, "and pay for all materials and labor," as required by Acts 1899, chapter 182, such addition became a part of the contract, and the bond validity secured both performance and payment for materials and labor. *City of Bristol v. Bostwick*, 304.

2. *Counties. Validity.*

Priv. Acts 1917, chapters 295, 479, authorizing Shelby county to aid Bolton College by issuing bonds and levying a tax to pay therefor, violates Constitution 1870, article 2, section 29, providing that a county's credit shall not be given in aid of any person, etc., unless such action be authorized by a three-fourths vote at an election held for that purpose. *Berry v. Shelby County*, 532.

See CONTRACTS; MUNICIPAL CORPORATIONS.

BURDEN OF PROOF.

1. *Death. Wrongful death.*

In an action for wrongful death due to an intentional act, the burden is on plaintiff first to establish his case by sufficient proof, but defendant has the burden of sustaining a plea of self-defense. *Hunt-Berlin Coal Co. v. Paton*, 611.

2. *Bills and notes. Nonnegotiable note. Burden of proving consideration.*

There is no presumption of consideration for transfer of a non-negotiable note, and the burden of proving consideration is upon the holder. *Weems v. Neblett*, 655.

3. *Licenses. Occupation tax.*

The burden is on one who obtains notes from a holder in exchange for property to clearly show that he was not engaged in the business of shaving notes without a license; the presumption be-

CARMACK AMENDMENT—CARRIERS.

BURDEN OF PROOF—Continued.

ing, in the absence of other evidence, that they were obtained in the exercise of the taxable privilege. *Evans v. Williams*, 677.

See GIFTS.

CARMACK AMENDMENT.

See CARRIERS.

CARRIERS.

1. *Interstate. Discrimination. Carrier's liability.*

An agreement by a carrier to pay damages, not occurring on its lines, to goods shipped under a bill of lading providing that no carrier shall be liable for loss other than on its own lines, is a discrimination against the uniformity of responsibility required of carriers of interstate commerce, and is unenforceable *Southern Ry. Co. v. Lewis & Adcock Co.*, 37.

2. *Bills of lading. Limiting liability of connecting carriers.*

Carmack Amendment (Act Cong. Feb. 4, 1887, chapter 104, section 20, 24 Stat. 386, as amended by Act Cong. June 29, 1906, Chapter 3591, section 7, pars. 11, 12, 34 Stat. 595 [U. S. Comp. St. 1916, sections 8604a 8604aa]), creating in initial carriers unity of responsibility for transportation to destination, does not preclude limiting the responsibility to shipper by a connecting carrier to damages on its own lines, and such limitation is good at common law. *Id.*

3. *Connecting carriers. Actions. Estoppel.*

A connecting carrier is not estopped to rely on a provision in a bill of lading, limiting liability to loss occurring on its own lines, to defeat recovery on an unlawful contract made by its agent to pay such loss on interstate shipment. *Id.*

4. *Construction of logging road. Contract. Freight rates.*

Under a railroad's contract to construct a logging railroad to connect with a main line, and to transport lumber, etc., to a junction on the main line at four cents per hundred pounds in excess of the rates currently in force from the junction, the railroad's charge and collection of four cents, plus the regular through rate charges from the junction, and its receipt of three cents from the connecting carrier for producing the traffic, was authorized, provided there was no discrimination between shippers. *Carolina Spruce Co. v. Black Mountain R. Co.*, 137.

5. *Rates. Originating traffic.*

The established and well-known practice among railroad companies to allow to the carrier originating the business an ad-

CERTIORARI.

CARRIERS—Continued.

vantage in the distribution or division of the rate has been recognized and by fair inference upheld by the Interstate Commerce Commission and the United States supreme court. *Ib.*

6. *Rates. Discrimination.*

Where a railroad contracted to construct a line from a main line junction to a timber tract, and to transport lumber, etc., at a certain rate, the shipper, if entitled to the part of the joint through rate paid by the connecting carriers to the railroad for originating traffic, would have an undue and forbidden preference over other shippers, and a contractual obligation, that it should receive such distribution would not justify such discrimination, and a State court would not enforce such a contract. *Ib.*

CERTIORARI.

1. *Writ. Issuance. Discretion.*

While the issuance of a writ of certiorari is a matter within the discretion of the court; and a writ may be refused which would otherwise be issued where substantial justice has been reached by an inferior tribunal, or where public inconvenience or confusion would follow the writ, yet where the supreme court had found that one removed from the office of chief of police of a city was entitled to *certiorari* to review the removal, the contention that the court in its discretion might decline to entertain the writ is foreclosed. *City of Knoxville v. Connors*, 45.

2. *Writ. Scope of relief.*

Where it was found on writ of *certiorari* that removal of petitioner from the office of chief of police was unauthorized because he was not accorded trial as required by the city's charter, and charges were not preferred against him, the order of removal should be quashed, but the court is without jurisdiction to direct a reinstatement of petitioner, for that would unduly extend the writ and grant relief beyond the scope of the pleadings. *Ib.*

3. *Moot case. Costs. Merits.*

On *certiorari* bringing up question of eligibility of officer to hold office, the supreme court would consider the case, though term of office has expired where matter of costs remains to be adjudicated and this depends on the merits. *State ex rel. v. Howard*, 73.

4. *Supersedeas. Circuit courts. Supervisory jurisdiction over inferior tribunals including juvenile court.*

The general appellate and revisory jurisdiction of the circuit court over all inferior tribunals created by the legislature and

CERTIORARI.

CERTIORARI—Continued.

vested with judicial powers, as the juvenile court of a county, may be invoked by *certiorari* and *supersedeas* where no appeal or writ of error lies for the correction of the judgments of such inferior tribunals, and such jurisdiction may be exercised, not only when the inferior tribunals have exceeded their powers on are acting irregularly, but for errors of law and fact. *State v. Bockman*, 422.

5. *Courts. Judgment of juvenile delinquency. Review by certiorari. Jurisdiction of circuit court. Statute.*

Under Thompson's Shannon's Code, sections 6063, 6072, providing that jurisdiction of all matters not otherwise provided for is intrusted to the circuit court, one adjudged to be a juvenile delinquent by the juvenile court of a county may obtain review of his case by *certiorari* in the circuit court of that county. *Id.*

6. *Time for petition.*

Under Thompson's Shannon's Code, section 6321a2, providing that *certiorari* to review judgment of the court of civil appeals shall not be issued after ninety days from final judgment of such courts, the statutory period runs from the date of the denial of the first petition for rehearing. *State v. Bank & Trust Co. v. Nashville Trust Co.*, 472.

7. *Time for petition.*

Since a second petition for rehearing by the same party is not recognized by the rules of the appellate courts, such petition, when denied, cannot be availed of to extend the ninety-day period within which writ of *certiorari* to review the judgment must be applied for. *Id.*

8. *Review of proceedings in juvenile court.*

Proceedings in the juvenile court must be reviewed in the circuit court by *certiorari*. *State ex rel. v. West*, 522.

9. *Habeas corpus. Juvenile court. Proceedings as to custody of child.*

Statutory *certiorari* from the circuit court lies to review the action of the juvenile court in proceedings involving the custody of a child, and statutory *certiorari* will issue, that the case may be tried again upon its merits in the circuit court, and not the common-law writ of *certiorari*, which opens for review merely the legality of the action of the inferior tribunal. *Jones v. State ex rel.*, 547.

 CODE CITED AND CONSTRUED.

CERTIORARI—Continued.

10. *Municipal corporations. Review of proceedings of city commissioners.*

Common-law *certiorari* was the proper remedy in behalf of members of the board of city commissioners to review proceedings of board to deprive them of office. *Ashcroft v. Goodman*, 625.

11. *Municipal corporations. Extent of relief. "Restitution."*

On *certiorari* to review action of board of city commissioners in depriving members of such board of their offices, a writ of restitution to place such members in their respective offices was not a proper remedy, and the court of civil appeals had no authority to grant such relief, the writ of restitution being unenlarged as to scope by Thompson's Shannon's Code, section 4867, the writ of restitution at common law being a remedy whose object was to restore to the appellant that of which he had been deprived by the enforcement of the judgment against him during the pendency of the suit (citing Words and Phrases, Restitution). *Ib.*

12. *Informal and technical errors.*

Writs of *certiorari* and *supersedeas* to review, reverse, and stay execution of decree of court of civil appeals ruling that members of city council had been wrongfully deprived of office and directing issuance of writs of restitution will not be granted, although writ of restitution was without authority; practical justice having been attained, and the issuance of writ of *certiorari* to which the *supersedeas* applied for is dependent being within judicial discretion of the court, to be granted only when necessary to prevent substantial wrong, especially where the matters in controversy are of a public nature. *Ib.*

 CODE CITED AND CONSTRUED.

- §§ 127, 4179, 4180, 4186 (1858). Judges. County court. Chairman. Qualification. *State ex rel. v. Howard*, 73.
- § 1574, subsec. 3 (T.-S.). Railroads. Signals. Sufficiency of evidence. *Alexander v. V. & S. W. Ry. Co.*, 52.
- §§ 2330, 2438 (T.-S.). Taxation. Privilege taxes. Railroads. *State ex rel. v. L. & N. R. Co.*, 406.
- §§ 2549, 4515, 4539-4542, 4543-4546, 4516 (1858). Corporations. Foreign. Attachment. Service. *Brewer v. De Camp Glass Casket Co.*, 97.
- § 2853a2 (T.-S.). Constitutional law. Licenses. Statutes. Due process of law. Compensation. Uniform taxation. General laws. *State v. Erwin*, 341.

CODE CITED AND CONSTRUED.

CODE CITED AND CONSTRUED—Continued.

- § 3074 (T.-S.). Railroads. Separate accommodations for races. Statutes. Construction. *Shelton v. C., R. I. & P. R. Co.*, 378.
- § 3142, subsec. 4 (T.-S.). Frauds, statute of. Sufficiency of writing. Signed letters. *Brewer v. De Camp Glass Casket Co.*, 97.
- § 3516a48 (T.-S.). Bills and notes. Presumptions. Ownership of note. *Allen v. Hayes*, 56.
- §§ 3531, 3580 (T.-S.). Mechanics' liens. Lumber used for temporary purposes. Right to lien. *York Lumber & Mfg. Co. v. McKnight & Mertz*, 687.
- § 3540 (T.-S.). Municipal corporations. Public buildings. Contractor's bonds. Liens of laborers. Time to file. *City of Bristol v. Bostwick*, 304.
- § 3540 (T.-S.). Mechanics' liens. Notice of claim. Time. Necessity for. *Bird Bros. v. Southern Surety Co.*, 11.
- § 3666 (T.-S.). Sales. Conditional sales. Personal judgment. Replevin. *Johnson v. Furniture Co.*, 580.
- §§ 3749-3752 (T.-S.). Vendor and purchaser. Prior deeds. Duty to make inquiry. *Kobbe v. Harriman Land Co.*, 251.
- § 3751 (S.). Execution. Lis pendens. Effect. *Hammock v. Qualls*, 388.
- §§ 4012, 4007, 4455 (T.-S.). Limitation of actions. Commencement of suit. Absence from state. *McFarland v. Bowling*, 691.
- § 4239 (T.-S.). Curtesy. Rights of husband. Curtesy initiate. *Day v. Burgess*, 559.
- § 4249a (T.-S.). Curtesy. Consummate. Statutes. Construction. *Hull v. Hull*, 572.
- § 4249a (T.-S.). Curtesy. Essentials. *Day v. Burgess*, 559.
- §§ 4321, 4336 (T.-S.). Constitutional law. Parent and child. Rights of parent. Due process of law. *Kenner v. Kenner*, 700.
- § 4342a44 (T.-S.). Master and servant. Unlawful employment. Suit for injuries. *Harrison v. Roscoe*, 511.
- § 4505 (T.-S.). Indictment and information. Wife of prosecutrix. Nonsupport. *Moye v. The State*, 680.
- §§ 4851, 4852 (S.). Appeal and error. Wayside bill of exceptions. Motion for directed verdict. *Oliver Mfg. Co. v. Skimp*, 297.
- § 4902a (T.-S.). Judgment. Motion in arrest. Grounds. *Waterhouse v. Furniture Co.*, 117.
- § 5093 (T.-S.). Landlord and tenant. "Unlawful detainer." Right to maintain. *Fine v. Lawless*, 160.
- § 5503 (T.-S.). Habeas corpus. Custody of child. Juvenile court judgment. *State ex rel. v. West*, 522.
- §§ 5992, 6027 (T.-S.). Judges. County court. Chairman. Qualifications. Statutes. Construction. *State ex rel. v. Howard*, 73.
- § 6006 (S.). Statutes. Constructions. *State ex rel. v. Howard*, 73.

 COMMERCE.

CODE CITED AND CONSTRUED—Continued.

- §§ 6063, 6072 (T.-S.). Courts. Judgment of juvenile delinquency. Review by certiorari. Jurisdiction of circuit court. Statute. *State v. Bockman*, 422.
- § 6321a2 (T.-S.). Certiorari. Time for petition. *State Bank & Trust Co. v. Nashville Trust Co.*, 472.
- §§ 6321a, 6329 (T.-S.). Courts. Jurisdiction of supreme court and court of civil appeals. Supervision of action of juvenile courts. Statutes. "Court of law." "Court of equity." "Common-law court." "Circuit court." *State v. Bockman*, 422.
- § 6976 (T.-S.). Constitutional law. Depriving of liberty. Law of the land. *Moye v. The State*, 680.

COMMERCE.

1. *Railroads engaged in "interstate commerce."*

To be within the federal Employers' Liability Act (Act Cong. April 22, 1908, chapter 149, 35 Stat. 65 [U. S. Comp. St. 1916, sections 8657-8665]), one need not be directly engaged in an interstate train movement; the test being whether his task was so directly and immediately connected therewith, as to form a part or necessary incident, even though only preliminary, thereto. *C., N. O. & T. P. Ry. Co. v. Morgan*, 27.

2. *Railroads. Use of engine in "interstate commerce."*

Where a locomotive was habitually and exclusively used in interstate train movements, and not designated for any intrastate or mixed use, an employee working upon it was engaged interstate commerce. *Id.*

3. *Railroads. Federal Employers' Liability Act. "Interstate commerce."*

Where an engine had been specifically designated for a certain interstate train, and a hostler was told to fire and prepare the engine for such train, and while doing so was injured, he was engaged in interstate commerce within the federal Employers' Liability Act. *Id.*

4. *Interstate commerce. Restriction by license tax.*

The tax imposed by Pub. Acts 1917, chapter 70, on the business of emigrant agents, it not a restriction on interstate commerce. *McMillan v. City of Knoxville*, 321.

5. *Interstate commerce. Privilege taxes. Sale of alcoholic beverages.*

Acts 1917, chapter 70, imposing a privilege tax on wholesale dealers in foreign-made non-intoxicating beverages containing al-

 CONDITIONAL SALES—CONSTITUTION CITED.

COMMERCE—Continued.

cohol, and on domestic manufacturers of such drinks, is unconstitutional within Const. U. S. article 1, section 8, sub-section 3, as imposing a burden on interstate commerce. *Diehl & Lord v. Hatley*, 466.

6. *Interstate commerce. Taxes.*

Mere fact that tax was imposed on manufacture in the State of nonintoxicating alcoholic beverages larger than that imposed on wholesalers of such drinks made outside the State does not justify the classification in Acts 1917, chapter 70, and the omission therein to tax wholesalers of the domestic product. *Ib.*

7. *Interstate commerce. Taxes.*

Conceding that only foreign-made nonintoxicating alcoholic beverages were ever in the State, Acts 1917, chapter 70, imposing tax only on wholesalers of such foreign-made beverages, is invalid as an imposition on interstate commerce. *Ib.*

CONDITIONAL SALES.

See FIXTURES; SALES.

CONSIDERATION.

See BILLS AND NOTES; CONTRACTS.

CONSTITUTION CITED AND CONSTRUED.

- Art. 1, sec. 8. Constitutional law. Due process of law. *Galoway v. State*, 484.
- Art. 1, secs. 8, 12; Art. 2, sec. 28; Art. 11, sec. 8. Constitutional law. Licenses. Statutes. Due process of law. Compensation. Uniform taxation. General laws. *State v. Erwin*, 341.
- Art. 1, sec. 8 (1870). Constitutional law. Depriving of liberty. Law of the land. *Moye v. The State*, 680.
- Art. 1, sec. 10, ch. 3. States agreement or compact with another state. Constitutional provisions. Implied assent. *Russell v. American Association*, 124.
- Art. 1, sec. 15 (1870). Habeas corpus. Custody of child. Juvenile court judgment. *State ex rel. v. West*, 522.
- Art. 1, sec. 15 (1834). Habeas corpus. Custody of child. Juvenile court judgment. *State ex rel. v. West*, 522.
- Art. 1, sec. 15 (1796). Habeas corpus. Custody of child. Juvenile court judgment. *State ex rel. v. West*, 522.
- Art. 2, sec. 17. Statutes. Repeal. Constitutionality. *Chattanooga Ry. & Light Co. v. Bettis*, 332.

CONSTRUCTION OF INSTRUMENTS.

CONSTITUTION CITED AND CONSTRUED—Continued.

- Art. 2, sec. 17. Statutes. Subjects and title. Crimes. *Moye v. The State*, 680.
- Art. 2, sec. 28. Licenses. Nature of "license." Occupation tax. *McMillan v. City of Knoxville*, 319.
- Art. 2, sec. 28. Counties. Bonds. Validity. *Berry v. Shelby County*, 532.

CONSTRUCTION OF INSTRUMENTS.

1. *Insurance. Fraternal insurance. By-laws. Construction.*

The laws of a beneficial association or order, by which the members are bound as by contract, are to be liberally construed in favor of the indemnity of the member or his beneficiaries so as to effectuate the benevolent purpose of the order; but the construction must be of the laws as a whole, rather than of a segregated clause, and it must not be a forced one nor one that runs counter to the manifest intention of the contracting parties expressed in unambiguous terms. *Honea v. American Council, J. O. U. A. M.*, 21.

2. *Insurance. Liability insurance. Extent of insurer's liability. "At its own expense."*

Under a policy insuring against loss from claims for personal injuries, limiting the insurer's liability on account of one accident to \$5,000, and reserving to the insurer the right to assume the management and defense of suits for such injuries, and providing that when it assumed such defense it would defend at its own expense, the moneys expended in such defense not to be included in the limit of liability previously fixed, the insurer was liable for taxable costs in addition to the \$5,000; such costs being a part of the costs of defense, and the expression "at its own expense" meaning practically the same as "at the cost" of the insurer. *Casey-Hedges Co. v. Southwestern Surety Co.*, 63.

3. *Insurance. Liability insurance. Extent of liability. "Moneys expended in defense."*

Under such policy, where an appeal was taken from a judgment recovered against insured on the claim for personal injuries, the insurer was liable for the interest accruing on the portion of the judgment for which it was liable; such interest coming within the term "moneys expended in said defense," which by the policy were to be excluded from the limitation of liability. *Id.*

CONSTRUCTION OF INSTRUMENTS.

CONSTRUCTION OF INSTRUMENTS—Continued.

4. *Wills. Construction.*

A gift by testator of the use of all his property, real and personal, to his wife for her life, created a life estate in all property, real and personal. *Cross v. Buskirk-Rutledge Lumber Co.*, 79.

5. *Wills. Construction. Contradiction.*

Where a testator gave wife a life estate in all his property, a power of sale given to executors cannot be construed to deprive her of her life estate, or dispose of property without her joining in the deed. *Ib.*

6. *Contracts. Construction of logging road. Extension of time. "Act of God." "Causes beyond its control." "Unavoidably prevented."*

Under a railroad's contract to construct and put in operation a road from a timber tract to a main line junction, the provision, unless prevented by other "causes beyond its control," did not refer only to a cause which was an "act of God," that term meaning a happening due directly and exclusively to a natural cause or causes in no sense attributable to human agencies, which could not be resisted or prevented by the exercise of such foresight, prudence, and care as the situation might have called into exercise; but the provision was synonymous with "unavoidably prevented," the words "beyond control" implying a pledge to exercise human agency to the point of excluding negligence, so that unanticipated trouble and delay encountered in a cut by reason of a peculiar mud or clay called "gumbo," much harder to remove than rock, entitled the railroad to thirty days' additional time to finish construction. *Carolina Spruce Co. v. Mountain R. Co.*, 137.

7. *Contracts. Construction of logging road. "Constructed." "Completed."*

Where the road had until June 1st to finish construction of the line, the construction of a road in which the curves were fully tied, but the straight portions of which were half tied, but which enabled an engine and cars with additional ties to be sent forward, and put it in condition to bear any traffic tendered by the lumber company, and where heavy mill machinery was hauled over the line early in April, and the roadway was thereafter steadily improved, it was constructed and placed in operation for general traffic; the word "constructed" having substantially the signification of the word "completed." *Ib.*

 CONSTITUTIONAL LAW.

CONSTRUCTION OF INSTRUMENTS—Continued.

8. *Contracts. Construction of logging railroad. Operation. Equipment. "Constructed." "Completed."*

The road was constructed and placed in operation, even though the contractor, which had purchased engines, was dependent upon its connecting carriers for its freight car supply, as the word "completed" did not include the equipment of the road with the contractor's own rolling stock, especially where there was no express contract provision that the railroad would purchase rolling stock. *Ib.*

9. *Contracts. Construction. Validity.*

Where a contract may fairly be construed not to violate the law, the courts should incline to give it that construction, and thus maintain its validity. *Ib.*

10. *Contracts. Construction.*

It is the duty of the court primarily to construe every contract to effectuate the intention of the parties, though it may be necessary to ignore apparently inconsistent language. *City of Bristol v. Bostwick*, 304.

11. *Sales. Contracts. Construction.*

In construing a contract the previous dealings of the parties and the circumstances in which the contract was made and the situation of the parties may be considered. *Southern Pub. Ass'n. v. Clements Paper Co.*, 429.

12. *Sales. Contracts. Construction. Rights of parties.*

Under contract for paper specifying a minimum and a maximum quantity if the option was with the seller, it was bound to deliver the minimum, and might deliver any additional quantity up to the maximum; but if it lay with the purchaser, the purchaser was bound to accept the minimum, and could require the maximum. *Ib.*

See PRINCIPAL AND SURETY.

CONSTITUTIONAL LAW.

1. *Licenses. Freedom of contract.*

Such tax does not interfere with freedom of contract. *McMillan v. City of Knoxville*, 319.

2. *Licenses. Equal protection of the laws.*

Such tax does not deny equal protection of the laws, because the business of hiring laborers within the State is not subject to a like tax. *Ib.*

CONSTRUCTION OF INSTRUMENTS.

CONSTRUCTION OF INSTRUMENTS—Continued.

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CONSTITUTIONAL LAW.

CONSTRUCTION OF INSTRUMENTS—Continued.

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The road was constructed and placed in operation, even though the contractor, which had purchased engines, was dependent upon its connecting carriers for its freight car supply, as the word "completed" did not include the equipment of the road with the contractor's own rolling stock, especially where there was no express contract provision that the railroad would purchase rolling stock. *Ib.*
9. *Contracts. Construction. Validity.*
Where a contract may fairly be construed not to violate the law, the courts should incline to give it that construction, and thus maintain its validity. *Ib.*
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See PRINCIPAL AND SURETY.

CONSTITUTIONAL LAW.

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2. *Licenses. Equal protection of the laws.*
Such tax does not deny equal protection of the laws, because the business of hiring laborers within the State is not subject to a like tax. *Ib.*

 CONSTITUTIONAL LAW.

CONSTITUTIONAL LAW—Continued.

 3. *Licenses. Statutes. Due process of law. Compensation. Uniform taxation. General laws.*

Acts 1907, chapter 32 (Thomp.-Shan. Code, section 2853a2 et seq.), requiring registration and license fee of \$3 in order to keep a female dog, the fees over expenses to go to the school fund, does not contravene Const. article 1, sections 8, 21, article 2, section 28, nor article 11, section 8, providing that property shall not be taken without a judgment of peers of the land, or without compensation, that taxes shall be uniform, and prohibiting special laws. *State v. Erwin*, 341.

 4. *Exemptions. Class legislation.*

Acts 1905, chapter 376, section 2, providing a ninety per cent. exemption for persons with an income of \$40 per month or less, and a maximum exemption of \$36 to persons earning over \$40 per month, is not unfair discrimination, but such classification is reasonable. *Frazier v. Nashville Veterinary Hospital*, 440.

 5. *Due process of law.*

Priv. Acts 1915, chapter 564, section 20, requiring the owner to furnish a wagon and team for road work, and feed therefor, does not violate Constitution article 1, section 8, providing that no man shall be deprived of his property, but by the judgment of his peers and the law of the land. *Galoway v. State*, 484.

 6. *Eminent domain. Taking property for road work.*

Neither does it, as to the wagon and team, violate Constitution article 1, section 21, forbidding the taking of property for public use without compensation; but as to the feed it does. *Ib.*

 7. *Statutes. Partial invalidity. Effect.*

The statute is not entirely invalid because of the invalidity of the requirement as to feed. *Ib.*

 8. *Curtesy. Vested rights. Statute.*

Where the husband at the effective date of the Married Woman's Emancipation Act (Thompson's Shannon's Code, section 4249a) had only an estate by the curtesy initiate, which was not a vested right, since his wife was then living, the legislature could pass such act which prevented the accrual of the curtesy consummate on the wife's death. *Day v. Burgess*, 559.

 9. *Statutes. Subjects and title. Crimes.*

Acts 1915, chapter 125, entitled "An act to require husbands to provide for their wives, . . ." and providing that it is a misdemeanor (a) for any husband to willfully and without good cause neglect or fail to provide for his wife according to his

CONTRACTS.

CONSTITUTIONAL LAW—Continued.

means, and (b) for any husband willfully and without good cause to leave his wife destitute or in danger of becoming a public charge, does not violate Constitution article 2, section 17, providing that no bill shall embrace more than one subject, that subject to be expressed in the title. *Moye v. The State*, 680.

10. *Depriving of liberty. Law of the land.*

Acts 1915, chapter 125, providing that the judge of the juvenile court shall, if he pleads guilty, bind a husband charged with nonsupport over for the action of the grand jury under bond, should be read in the light of Thompson's Shannon's Code, section 6976, providing that no person can be committed to prison for any criminal matter until examination thereof be first had before some magistrate, and the judge before committing an accused to jail for failure to obtain a bond should hear evidence as to the existence of a probable cause of guilt, unless there were a waiver by the accused, and hence the statute does not violate Constitution, article 1, section 8, providing that no person shall be taken or imprisoned or in any manner deprived of his liberty but by the judgment of his peers of the law of the land. *Id.*

11. *Parent and child. Rights of parent. Due process of law.*

A father has no property right in a child, and a claim that he was deprived of his property without due process of law and without compensation in violation of Const. U. S. Amend. 14, in that by losing its custody in divorce proceedings where he was not personally served with process he was deprived of its services, cannot be considered, although a parent is entitled to damages for value of services of a child unlawfully restrained or injured, and is also entitled to the child's earnings, but cannot compel it to do service for another. *Kenner v. Kenner*, 700.

See COMMERCE; TAXATION.

CONTRACTS.

1. *Carriers. Interstate. Discrimination. Carrier's liability.*

An agreement by a carrier to pay damages, not occurring on its lines, to goods shipped under a bill of lading providing that no carrier shall be liable for loss other than on its own lines, is a discrimination against the uniformity of responsibility required of carriers of interstate commerce, and is unenforceable. *Southern Ry. Co. v. Lewis & Adcock Co.*, 37.

CONTRACTS.

CONTRACTS—Continued.

2. *Carriers. Bills of lading. Limiting liability of connecting carriers.*

Carmack Amendment (Act Cong. Feb. 4, 1887, chapter 104, section 20, 24 Stat. 386, as amended by Acts Cong. June 29, 1906, chapter 3591, section 7, pars. 11, 12, 34 Stat. 595 [U. S. Comp. St. 1916, sections 8604a, 8604aa]), creating in initial carriers unity of responsibility for transportation to destination, does not preclude limiting the responsibility to shipper by a connecting carrier to damages on its own lines, and such limitation is good at common law. *Southern Ry. Co. v. Lewis & Adcock Co.*, 37.

3. *Vendor and purchaser. Contract for warranty deed. When contract becomes executed. Remedies of vendee.*

Where title is defective, delivery of a warranty deed to one who has gone into possession on representation of good title under contract of bargain and sale, but providing for "apt and proper deed with covenants of general warranty," does not render the contract an executed one, so as to prevent a rescission of the contract, in the absence of waiver. *Cross v. Buskirk-Rutledge Lumber Co.*, 79.

4. *Vendor and purchaser. Contract for warranty deed. When executed.*

Under contract for warranty deed, delivery of warranty deed, where title of grantor depends on parol evidence of adverse possession, is not sufficient to render contract executed, in absence of waiver, because title must be good as founded on the records, and not on fact not of record. *Ib.*

5. *Specific performance. Contracts for sale of land.*

Although grantor has good title by reason of adverse possession, a contract of sale of such land cannot be specifically enforced unless good title is shown of record, because a purchaser does not have to take a title which will have to be proved by parol evidence. *Ib.*

6. *Construction of logging road. Extension of time. "Act of God." "Causes beyond its control." "Unavoidably prevented."*

Under a railroad's contract to construct and put in operation a road from a timber tract to a main line junction, the provision, unless prevented by other "causes beyond its control," did not refer only to a cause which was an "act of God," that term meaning a happening due directly and exclusively to a natural cause or causes in no sense attributable to human agencies, which could not be resisted or prevented by the exercise of such foresight, prudence, and care as the situation might have

 CONTRACTS.

CONTRACTS—Continued.

called into exercise; but the provision was synonymous with "unavoidably prevented," the words "beyond control" implying a pledge to exercise human agency to the point of excluding negligence; so that unanticipated trouble and delay encountered in a cut by reason of a peculiar mud or clay called "gumbo," much harder to remove than rock, entitled the railroad to thirty days' additional time to finish construction. *Carolina Spruce Co. v. Black Mountain R. Co.*, 137.

7. *Construction of logging road. "Constructed." "Completed."*

Where the road had until June 1st to finish construction of the line, the construction of a road in which the curves were fully tied, but the straight portions of which were half tied, but which enabled an engine and cars with additional ties to be sent forward, and put it in condition to bear any traffic tendered by the lumber company, and where heavy mill machinery was hauled over the line early in April, and the roadway was thereafter steadily improved, it was constructed and placed in operation for general traffic; the word "constructed" having substantially the signification of the word "completed." *Ib.*

8. *Construction of logging railroad. Operation. Equipment. "Constructed." "Completed."*

The road was constructed and placed in operation, even though the contractor, which had purchased engines, was dependent upon its connecting carriers for its freight car supply, as the word "completed" did not include the equipment of the road with the contractor's own rolling stock, especially where there was no express contract provision that the railroad would purchase rolling stock. *Ib.*

9. *Carriers. Construction of logging road. Freight Rates.*

Under a railroad's contract to construct a logging railroad to connect with a main line, and to transport lumber, etc., to a junction on the main line at four cents per hundred pounds in excess of the rates currently in force from the junction, the railroad's charge and collection of four cents, plus the regular through rate charges from the junction, and its receipt of three cents from the connecting carrier for producing the traffic, was authorized, provided there was no discrimination between shippers. *Ib.*

10. *Carriers. Rates. Discrimination.*

Where a railroad contracted to construct a line from a main line junction to a timber tract, and to transport lumber, etc., at a certain rate, the shipper, if entitled to the part of the joint

CONTRACTS.

CONTRACTS—Continued.

through rate paid by the connecting carriers to the railroad for originating traffic, would have an undue and forbidden preference over other shippers, and a contractual obligation, that it should receive such distribution would not justify such discrimination, and a State court would not enforce such a contract. *Carolina Spruce Co. v. Black Mountain R. Co.*, 137.

11. *Construction. Validity.*

Where a contract may fairly be construed not to violate the law, the courts should incline to give it that construction, and thus maintain its validity. *Ib.*

12. *Municipal corporations. Public buildings. Bonds of contractors.*

Where contractor on a public building executed a bond for performance and on his telegraphic request, after advice of the city attorney, the surety by wire consented to insert the words, "and pay for all materials and labor," as required by Acts 1899, chapter 182, such addition became a part of the contract, and the bond validity secured both performance and payment for materials and labor. *City of Bristol v. Bostwick*, 304.

13. *Construction.*

It is the duty of the court primarily to construe every contract to effectuate the intention of the parties, though it may be necessary to ignore apparently inconsistent language. *Ib.*

14. *Municipal corporations. Public buildings. Bonds of contractors.*

Mere fact that a contractor's bond, securing both performance, under Acts 1915, chapter 192, and also payment for labor and materials, under Acts 1899, chapter 182, was in a penalty larger than that required by the act of 1899, did not indicate that the parties were unmindful of the latter statute. *Ib.*

15. *Municipal corporations. Public buildings. Contractor's bonds. Liens of laborers. Time to file.*

Where contractor on public building was enjoined from continuing contract, filing of labor and material claims within thirty days from such injunction was sufficient compliance with Acts 1899, chapter 182, section 4, requiring such claims to be filed within thirty days after completion of the contract. *Ib.*

16. *Infants. Validity. Want of consideration.*

As a minor is prejudiced by sale without advertisement of furniture bought on the installment plan, under Acts 1911, chapter 8, section 1, his agreement, waiving advertisement, is void; there being no consideration for such a waiver except the cost of advertisement. *Ward v. Sharpe*, 347.

CONTRACTS.

CONTRACTS—Continued.

17. *Sales. Validity. Mutuality. Certainty.*

A letter from a corporation to another, stating, "You may enter our contract for a minimum quantity of one hundred twenty tons, maximum quantity of one hundred forty-five tons" of paper specifying the prices and terms signed by the corporation and accepted by the other, is not void for uncertainty or lack of mutuality. *Southern Pub. Ass'n v. Clements Paper Co.*, 429.

18. *Sales. Construction.*

In construing a contract the previous dealings of the parties and the circumstances in which the contract was made and the situation of the parties may be considered. *Ib.*

19. *Sales. Construction. Rights of parties.*

Under contract for paper specifying a minimum and a maximum quantity if the option was with the seller, it was bound to deliver the minimum, and might deliver any additional quantity up to the maximum; but if it lay with the purchaser, the purchaser was bound to accept the minimum, and could require the maximum. *Ib.*

20. *Sales. Construction. Rights of parties.*

Where a publishing company authorized a paper company to enter its order for a minimum of one hundred and twenty tons of paper and maximum of one hundred and forty-five tons, the offer being the purchaser's, the purchaser had the option, and could require the seller to furnish the maximum. *Ib.*

21. *Consideration. Sufficiency.*

A garnishee who was desirous of making a trip to another town in company with defendant in the garnishment proceeding offered to pay \$100 to plaintiff if he would continue the case. The object in making the trip was to consummate a deal in coal lands whereby the garnishee expected to profit. *Held*, that the promise was supported by a consideration consisting of the benefit to the garnishee in being able to make the trip regardless of the fact that the expected benefits were not realized. *Townsend v. Neuhardt*, 695.

22. *Consideration. Forbearance.*

Where a plaintiff in garnishment, in consideration of \$100 paid to him by the garnishee, continued the case, the forbearance on plaintiff's part, being a concession of part of his rights, constituted a sufficient consideration for the promise to pay. *Ib.*

CONTRIBUTORY NEGLIGENCE—CORPORATIONS.

CONTRACTS—Continued.

23. *Consideration. Sufficiency.*

To support a contract, the consideration does not have to be adequate; it need only be valuable. *Townsend v. Neuhardt*. 695.

See CARRIERS.

CONTRIBUTORY NEGLIGENCE.

1. *Railroads. Killing dog. Statute. "Highway."*

Under Thompson's Shannon's Code, section 2853a, providing that it shall be unlawful for any person to allow a dog belonging to him to go upon a highway, etc., the owner of a female dog who allowed her to go upon the track of a railroad where she was killed was guilty of contributory negligence, and could not recover her value; the railroad being a "highway." *C., N. O. & T. P. R. Co. v. Ford*, 291.

2. *Street railroads. Injuries to animals.*

Defendant railroad company was sued for negligently killing plaintiff's pig, and interposed a defense of contributory negligence, based upon plaintiff's violation of Acts 1899, chapter 23, making it unlawful to permit stock to run at large. *Held*, that such act, not being passed for the protection of defendant railroad company, it could not predicate a defense of contributory negligence thereon. *Chattanooga Ry. & Light Co. v. Bettis* 332.

See NEGLIGENCE.

CORPORATIONS.

Foreign. Attachment. Service.

Thompson's Shannon's Code, section 4515, declares that in actions commenced by attachment of property without personal service of process the attachment may be sued out or suit brought in any county where the real property lies or any part of the personal property may be found, while section 5211 authorizes an attachment against the property of a nonresident debtor or defendant. Sections 4539-4541, inclusive, provide for institution of actions against corporations either resident or nonresident by service of process on certain designed officers or agents Acts 1859-60, chapter 89, embodied in Thompson's Shannon's Code, section 4542, declares that where a corporation, company, or individual has an office or agency or resident director in any county other than that in which the chief officer or principal resides, service of process may be made upon any agent or clerk employed therein. Sections 2549 and

COSTS—COUNTIES.

CORPORATIONS—Continued.

4543-4546, respectively, relate to service on foreign corporations having no office or agency in the State and to substitutionary service on foreign corporation not domesticated and having neither property nor localized business. *Held*, that as section 4516, which apparently restricted the scope of service on agents, was enlarged by Acts 1859-60, chapter 89, a foreign corporation may be served by attachment of its property in any county where such property is found, regardless of the fact that its directors and officers reside in another county; this being particularly true where it did not appear that the corporation was at that time doing business in the State so as to render service of process on resident directors and officers valid. *Brewer v. De Camp Glass Casket Co.*, 97.

COSTS.

Certiorari. Moot case. Merits.

On *certiorari* bringing up question of eligibility of officer to hold office, the supreme court will consider the case, though term of office has expired where matter of costs remains to be adjudicated and this depends on the merits. *State ex rel. v. Howard*, 73.

See TAXATION.

COUNTIES.

1. *Judges. County court. Chairman. Qualifications.*

Under Constitution, article 6, section 1, vesting the judicial power of the State in the supreme court and other courts, and "in justices of the peace," Thompson's Shannon's Code, section 221, providing that a court to be called the county court is established in each county, composed of the magistrates, section 5992, providing that the county court consists of the justices of the county, and section 493, providing that every county is a corporation, and the justices of the county court are the representatives of the county, no one is eligible for the office of chairman of the county court who is not a justice of the peace of the county. *State ex rel. v. Howard*, 73.

2. *Bonds. Validity.*

Priv. Acts 1917, chapters 295, 479, authorizing Shelby county to aid Bolton College by issuing bonds and levying a tax to pay therefor, violates Constitution 1870, article 2, section 29, providing that a county's credit shall not be given in aid of any person, etc., unless such action be authorized by a three-fourths

CURTESY.

CURTESY—Continued.

joining, and section 4239, exempting rents of the wife's realty from seizure for the husband's debts, but providing that such statutes should not interfere with the husband's curtesy initiate, such estate is not entirely destroyed, but merely reduced from a vested estate to a contingent right, since section 4239 refers to curtesy consummate. *Day v Burgess*. 559.

4. *Estate by curtesy initiate.*

Though a child was born alive before change in character of curtesy initiate, a statute materially changing such estate applies to all property acquired by the wife subsequent to its enactment. *Ib.*

5. *Constitutional law. Vested rights. Statute.*

Where the husband at the effective date of the Married Woman's Emancipation Act (Thompson-Shannon Code, section 4249a) had only an estate by the curtesy initiate, which was not a vested right, since his wife was then living, the legislature could pass such act which prevented the accrual of the curtesy consummate on the wife's death. *Ib.*

6. *Consummate. Statutes. Construction.*

The Married Woman's Emancipation Act (Thompson-Shannon Code, section 4249a) did not of itself abolish the estate of tenancy by the curtesy consummate. *Hull v. Hull*, 572.

7. *Consummate. Lands of wife. Effect of husband's paying therefor.*

Where the husband pays for lands, directing the grantor to convey them to the wife, he acquires an estate by the curtesy consummate in such lands of his intestate wife, although no agreement between them, nor provision in the deed, dealt with curtesy, since, though the title was the wife's separate estate, an estate by the curtesy consummate may attach thereto when there is no specific language in the deed cutting off such estate. *Ib.*

8. *Consummate. Liability on mortgage.*

Where husband bought lands, and the deed ran to the wife, and they later joined in a trust deed for money borrowed, the husband, on the wife's death intestate, could not establish tenancy by curtesy consummate, without personally discharging the mortgage for protection of their minor children, since, as between husband and wife, the mortgage was his primary obligation. *Ib.*

DAMAGES—DEATH.

DAMAGES.

1. *Eminent Domain. Compensation. Dams. Appropriation of lands. Award to landlord.*

Erection of Tennessee river dam, backing water over lands adjacent to those occupied by plaintiff as tenant at will, was an appropriation for flowage purposes, all resulting damages from which were compensated by an award to the owner, plaintiff's landlord. *C. & T. R. Power Co. v. Lawson*, 354.

2. *United States. Government dam. Consequential damages. Liability of contractor.*

A private contractor, building a dam to be deeded to the United States in a navigable stream under direction and according to specifications of the United States, is liable only to the same extent as the government, which is not liable for the consequential damages to a tenant at will of one who has been compensated for land taken, by alternative overflow and recession of water, causing stagnation and breeding mosquitoes which infected plaintiff and his family with malaria. *Ib.*

3. *United States. Dams. Consequential damages. Liability of contractor.*

That a private contractor building dam to be deeded to the United States in navigable stream under direction and according to specifications of the United States retained an interest in the surplus water for power production did not render it liable for merely consequential damages to residents of the vicinity by reason of creation of unhealthful and malarial conditions. *Ib.*

4. *Railroads. Excessive damages.*

Where a railroad permitted negroes to be served while white passengers were in the dining car, on perceiving which plaintiff arose and left the car and the steward insisted in the hearing of others that she pay for the meal ordered, a verdict of \$750 was excessive and should be reduced to \$250. *Shelton v. C., R. I. & P. R. Co.*, 378.

DEATH.

1. *Self-defense. Question for jury.*

In an action for wrongful death, evidence as to self-defense, held to present a question for the jury. *Hunt-Berlin Coal Co. v. Paton*, 611

DEEDS.

DEATH—Continued.

2. *Self-defense. Law governing.*

The law of self-defense in a civil suit is the same as that governing in criminal prosecutions, except that the cause must be decided on a preponderance of testimony, whereas in criminal prosecutions defendant is entitled to the benefit of a reasonable doubt. *Hunt-Berlin Coal Co. v. Paton*, 611.

3. *Wrongful death. Burden of proof.*

In an action for wrongful death due to an intentional act, the burden is on plaintiff first to establish his case by sufficient proof, but defendant has the burden of sustaining a plea of self defense. *Ib.*

DEEDS.

1. *Vendor and purchaser. Prior deeds. Duty to make inquiry.*

Under Thompson's Shannon's Code, section 3749-3750, providing that instruments required to be registered give notice to third persons not having actual notice only from the noting thereof for registration on register's books; section 3751, providing that in case of rival instruments, the instrument first registered or noted for registration shall have preference over one of earlier date not noted for registration, and section 3752, providing that any of said instruments not so proved or acknowledged and registered or noted for registration shall be null and void as to existing and subsequent creditors of or *bona-fide* purchases from the makers without notice, purchaser claiming under deed containing clause excluding older and better titles would not be onerated with the duty of making inquiry or investigation for prior conveyances outside of and beyond the registration books provided by law, in the absence of actual notice, being purchasers the same as purchasers under deeds not containing such clauses and their instruments, deeds just the same. *Kobbe v. Harriman Land Co.*, 251.

2. *Vendor and purchaser. Duty of purchaser to make inquiry. Unrecorded deeds.*

It is the duty of one who purchases directly under a deed containing a clause, excluding older and better title, to explore the land for adverse possessions, and to search the public records for prior instruments affecting the title. *Ib.*

3. *Property conveyed. Exclusion clause.*

In the absence of a description of the excluded land in the deed itself a deed, notwithstanding a clause excluding older and better titles, conveys all that it describes. *Ib.*

See VENDOR AND PURCHASER.

DEMURRER—DIVORCE.

DEMURRER.

Stipulations. Appearance.

Where defendants moved to dismiss a bill and in the alternative demurred, it being stipulated that if the motion should be sustained, the demurrer would not be considered an entry of appearance, the motion being disallowed, defendants must be treated as having appeared. *Brewer v. DeCamp. Glass Casket Co.*, 97.

DISCRETION.

See EQUITY.

DIVORCE.

1. *Jurisdiction. Residence of parties. Fraud.*

Although, where plaintiff went to a foreign jurisdiction solely for the purpose of instituting divorce proceedings on service by publication, the decree may be attacked for fraud by action in a foreign State, yet such attack cannot be sustained where the plaintiff removed with the *bona-fide* purpose of making a home in such State. *Kenner v. Kenner*, 211.

2. *Jurisdiction. Service by publication.*

Jurisdiction of the defendant in divorce may be acquired in the foreign State by publication or other substituted service, although the defendant is a nonresident, and never has been in the State where suit was brought. *Id.*

3. *Operation and effect. Foreign decrees. Custody and support of children.*

The effect of a foreign decree, rendered on substituted service, is to free both spouses from the bonds of matrimony, where recognized; but recognition is optional, not being required by the full faith and credit clause of the federal Constitution, but may be given on ground of comity. *Id.*

4. *Operation and effect. Foreign divorces.*

Since the State by Shannon's Code, sections 4203, 4207, provides for rendering divorce decrees in favor of a resident against a non-resident, on service by publication, it should accord validity to decrees similarly rendered in other States where the proceedings, are not open to attack for fraud. *Id.*

5. *Custody of child. Interest of child.*

In determining the question of custody of infant children, the primary inquiry concerns their welfare rather than the technical legal right of the father to their possession and services. *Id.*

DIVORCE.

DIVORCE—Continued.

6. *Custody of children. Modification of order.*

Although in an award of the custody of child to mother in divorce proceedings the father should be accorded, by court order, as matter of right, permission to see his child on proper occasions, yet this is a matter for the foreign court which granted the divorce, which would, no doubt, make a suitable order on the subject upon proper request. *Kenner v. Kenner*, 211.

7. *Custody of child. Jurisdiction.*

The order of a State court directing that the custody of a child, of parents divorced by foreign court, shall alternate monthly between them, is beyond the court's power, where the child's domicile is with the mother in such foreign State. *Ib.*

8. *Custody of child. Judgment as to custody.*

As between the parents, the decree of divorce of a foreign court awarding the custody of the child is *res adjudicata*, subject to modification only by the court granting the decree, with the qualification, in case of removal of the child to another State, the courts of such State may, on change of circumstances, make new disposition of child as its best interests may require. *Ib.*

9. *Custody of child. Domicile of child.*

In awarding custody of a child in divorce proceedings, the domicile of the infant is unimportant, and will not be controlled by the legal right of a nonresident father to custody when actually in the custody of the mother; the court being solely concerned with the child's best interests. *Ib.*

10. *Custody of child. Proper parties. Child.*

In a proceeding by a father to procure the custody of his child from the possession of his divorced wife, the infant was not a proper party. *Ib.*

11. *Parties. Guardian ad litem.*

In a proceeding by a father to obtain the custody of his child from his divorced wife, a minor, the court properly refused to appoint a guardian *ad litem* for the wife, since her personal rights and those of the child may be properly protected without such guardian. *Ib.*

12. *Interlocutory order. Dismissal. Effect.*

An interlocutory order pending divorce suit concerning temporary custody of the child is abolished by voluntary dismissal of the suit, and cannot be *res adjudicata*, since it was never a final decree. *Ib.*

DOGS—EQUITY.

DOGS.

See ANIMALS; RAILROADS.

DOMICILE.

See DIVORCE.

DYING DECLARATIONS.

See EVIDENCE.

EMINENT DOMAIN.

Compensation. Dams. Appropriation of lands. Award to landlord.

Erection of Tennessee river dam, backing water over lands adjacent to those occupied by plaintiff as tenant at will, was an appropriation for flowage purposes, all resulting damages from which were compensated by an award to the owner, plaintiff's landlord. *C. & T. R. Power Co. v. Lawson*, 354.

EMPLOYERS' LIABILITY ACT.

See COMMERCE; MASTER AND SERVANTS.

EQUITY.

1. *Appeal and error. Equity cases. Trial de novo.*

While the general rule is that on appeals in chancery the trial is *de novo*, that relates, not to technicalities of procedure, but to the chancellor's decision on the facts, which does not have the same force as a verdict or finding of fact by a court of law sitting without a jury. *Brewer v. DeCamp Glass Casket Co.*, 97.

2. *Appeal and error. Compromise with debtors. Discretion of chancellor.*

In proceeding to wind up affairs of a bank, the chancellor in approving a compromise agreement with the stockholders and directors has a legal and judicial discretion, the abuse of which may be reviewed on appeal. *Knaffl v. Knoxville Banking & Trust Co.*, 240.

3. *Banks and banking. Compromise with debtors. Discretion of chancellor. Scope of inquiry.*

In a proceeding to wind up affairs of bank, where receiver petitioned for leave to compromise claims against stockholders and directors, the inquiry was not limited to whether there were sustainable causes of action against such persons, but the question was whether it was practicable and advantageous to compromise. *Id.*

ESTATES—ESTOPPEL.

EQUITY—Continued.

4. *Banks and banking. Compromise with debtors. Discretion of chancellor. Scope of inquiry.*

In a proceeding to wind up affairs of bank, where the receiver recommended a compromise, and creditors of the bank by their attorneys advised the compromise, and the master, the chancellor, and the court of civil appeals were in favor of the compromise, it was not an abuse of discretion to order it to be made. *Knafl v. Knoxville Banking & Trust Co.*, 240.

5. *Assignments. Equitable assignment. Discretion of chancellor.*

An equitable assignment will be enforced or not in the sound discretion of the chancellor according to justice, but not so as to defeat intervening rights of third persons. *Horn v. Nicholas*, 453.

ESTATES.

Trusts. Merger of estates.

Where a will devised a testator's residuary estate to trustees for the benefit of his widow and children, the bequest did not merge the estate with the remainder, where the trust was active, and merger would have defeated testator's intention. *Winters v. March*, 496.

See CURTESY.

ESTOPPEL.

1. *Carriers. Connecting carriers. Actions.*

A connecting carrier is not estopped to rely on a provision in a bill of lading, limiting liability to loss occurring on its own lines, to defeat recovery on an unlawful contract made by its agent to pay such loss on interstate shipment. *Southern Ry. Co. v. Lewis & Adcock Co.*, 37.

2. *Public lands. After-acquired title.*

Since a State in granting lands conveys without covenant, the doctrine of estoppel does not apply to a grant from the State so as to pass an after-acquired title, and such grant passes only the title the State then had. *Russell v. American Association*, 124.

3. *By pleading. Mutuality.*

Where neither complainant nor his predecessors in title were connected with a litigation against defendant's predecessor or had any knowledge of allegations in pleadings therein, there could be no estoppel in favor of complainant by reason of al-

EVIDENCE

ESTOPPEL—Continued.

legations against defendant or its predecessor; there being no mutuality as a basis therefor, and no privity between complainant and defendant's predecessor. *Kobbe v. Harriman Land Co.*, 251.

4. *Purchaser of note. Effect.*

Where the maker of a note took over his own note on which the payee's indorsement was forged, his acts were a mere purchase and he could reissue the note and set up estoppel against one claiming as the payee's assignee on a duplicate note which was forged, except as to the payee's indorsement, when the payee had in writing acknowledged the validity of his indorsement of the note bought by the maker. *Horn v. Nicholas*, 453.

5. *Rights of assignees.*

When estoppel has once arisen in favor of a party, it inures to the benefit of one thereafter purchasing or taking as security from him. *Ib.*

EVIDENCE.

1. *Filing bill of lading with interstate commerce commission. Presumption.*

There is a presumption that copies of forms of bills of lading in use by interstate carriers have been filed with the Interstate Commerce Commission. *Southern Ry. Co. v. Lewis & Adcock Co.*, 37.

2. *Signals. Sufficiency of evidence.*

The statement of a witness that the whistle was not sounded "until it blew inside the corporation here" and of another that he lives one and one-half miles from Rogersville and one mile from the spring, not giving relative location of each and of depot, does not locate city limits or establish defendant's failure to comply with Thompson's Shannon's Code, section 1574, subsection 3, as to giving signals before reaching and while passing through incorporated cities. *Alexander v. V. & S. W. Ry. Co.*, 52.

3. *Judicial notice. Incorporated cities.*

While a court will take judicial notice of the fact of incorporation of a city incorporated by state law, it cannot take judicial notice of the location of the boundaries thereof. *Ib.*

4. *Filing evidence of concurrence in joint rates. Presumption.*

It will be presumed that a carrier has complied with the law in respect to the filing of evidence of its concurrence in joint rates

EVIDENCE.

EVIDENCE—Continued.

established by other carriers, assuming to act for all of those named as participants. *Carolina Spruce Co. v. Black Mountain R. Co.*, 138.

5. *Vendor and purchaser. Knowledge of prior conveyances. Presumption.*

A purchaser under a deed containing an exclusion clause is conclusively presumed to know whatever could have been discovered from the public records or from an investigation for adverse possessions. *Kobbe v. Harriman Land Co.*, 251.

6. *Vendor and purchaser. Actual notice of unrecorded deed. Burden of proof.*

The burden of showing that a purchaser under a deed containing an exclusion clause had actual notice of a prior unrecorded deed was on the party asserting such fact. *Id.*

7. *Taxation. Collection. Prima-facie evidence.*

In a suit to collect a real estate transfer tax imposed by Revenue Act 1915, section 8, the value of the property stated in the deed is only *prima-facie* evidence of its true value. *State ex rel. v. L. & N. R. Co.*, 406.

8. *Homicide. Dying declarations. Admissibility.*

The victim of the murder was shot at close quarters with a shot-gun, and his wounds were very large and of a desperate nature. He received the wound late in the evening and lived until the following day. The physicians who visited him the following morning informed him that he would have a bare chance for recovery if he submitted to an operation. He protested against the operation; said it was no use; that he was going to die. After some further talk he ceased objecting to the operation and made the statement admitted in evidence. He never at any time manifested any hope, and while the anæsthetic was being administered again protested; said it was useless, and he was going to die. *Held*, the declaration was admissible, since the victim regarded his death as inevitable and imminent at the time he made the declaration, and was without hope of recovery, the bare circumstance that he consented to an operation not indicating that he entertained hope of recovery. *Dickason v. The State*, 601.

9. *Homicide. Dying declarations. Sense of impending death. How shown.*

The sense of impending death may be shown by the language of deceased, or inferred from the character of the wound, or set up by the testimony of physicians or other attendants. *Id.*

EXECUTION.

EVIDENCE—Continued.

10. *Homicide. Dying declarations. Admissibility. Question for court.*
The admissibility of dying declarations is a given question for the court. *Ib.*
11. *Homicide. Dying declarations. Admissibility. Question of fact.*
The competency of a dying declaration is ordinarily a mixed question of law and fact. *Ib.*
12. *Homicide. Review. Admission of dying declaration.*
While the supreme court has the power to review the action of the trial judge in holding a dying declaration admissible, it seldom does. *Ib.*
13. *Criminal law. Review. Admission of dying declaration.*
Where the fact of declarant's condition depends on the credibility of witnesses, great weight is to be attached to the conclusions of the trial judge in holding a dying declaration admissible, and the court on appeal will not reverse, unless there is manifest error. *Ib.*
14. *Criminal law. Record of divorce suit. Admissibility.*
In prosecution for murder, *held*, that the record in a divorce case brought against defendant should not be read to the jury, since charges made in the bill were calculated to prejudice defendant's case. *Ib.*
15. *Criminal law. Testimony by accused. Rebuttal.*
One accused of assault with intent to murder, having testified in his own behalf, and the State having produced testimony that he offered to pay \$500 if the prosecution were dismissed, should have been allowed in *rebuttal* to contradict such testimony. *Arnold v. The State*, 674.
16. *Criminal law. Appeal.*
Error in denying him the right so to testify was prejudicial. *Ib.*

EXECUTION.

1. *Justices of the peace. Liens.*
The levy of an execution from a justice's judgment upon land creates a lien in favor of the judgment creditor. *Hammock v. Qualls*, 388.
2. *Liens. Date.*
If the levy of an execution from a justice's judgment is followed by condemnation and issue of *venditioni exponas* by the

EXECUTION.

EXECUTION—Continued.

circuit court, the sale had in pursuance thereof relates back to the date of the levy, and the legal title conveyed by the sheriff's deed operates from that date. *Hammock v. Qualls*, 388.

3. *Real estate. Effect of levy.*

The levy of an execution upon real estate does not transfer the title to the land, nor create any interest in the sheriff, but merely fixes a lien upon the land for the payment of the debt. *Ib.*

4. *Lis pendens. Effect.*

While the record of the condemnation in the circuit court after levy of execution on a justice's judgment is constructive notice of the sheriff's sale, the order of condemnation is not a judgment establishing a lien, but only a mode of executing the levy. *Ib.*

5. *Lis. Pendens. Effect.*

The record of condemnation in the circuit court after levy of execution under a justice's judgment merely continues the lien of the levy to which the purchaser's title will relate when he procures a deed from the sheriff. *Ib.*

6. *Lis pendens. Effect.*

The only proper use of an execution being to enforce with diligence the collection of a debt, the creditor cannot use it merely as security for his debt by a levy on the property which creates merely a secret lien. *Ib.*

7. *Rights of purchaser. Reasonable diligence.*

Reasonable diligence is required of the purchaser at an execution sale in perfecting his title, which should be recorded. *Ib.*

8. *Vendor and purchaser. Right of purchaser. Reasonable diligence.*

Ordinary negligence in procuring a sheriff's deed, unexplained, should defeat the title of the execution purchaser as against one who buys in good faith and without notice of the title claimed by the execution purchaser. *Ib.*

9. *Rights of purchaser. Reasonable diligence.*

No positive rule can be stated as to what constitutes such delay of an execution sale purchaser in getting a sheriff's deed as will destroy the right to *lis pendens*, but one relying upon the rule must understand that his claim is *strictissimi juris*. *Ib.*

EXECUTORS AND ADMINISTRATORS.

EXECUTION—Continued.

10. *Vendor and purchaser. Rights of purchaser. Reasonable diligence.*

Where the purchaser at a sale under condemnation by the circuit court after levy of a justice's judgment delayed getting a sheriff's deed for over eight years, his delay was a gross negligence, amounting to an abandonment of his lien, and a subsequent purchaser without notice, who recorded his deed, had superior title, though the purchaser finally took a deed; such deed not relating back to the levy. *Ib.*

EXECUTORS AND ADMINISTRATORS.

1. *Funeral expenses. Allowance.*

A charge of \$1,000 by an undertaker for a casket which cost it only \$307 was exorbitant, and was properly reduced. *Wiles Bros. & Co. v. Wynne*, 397.

2. *Allowances. Funeral expenses.*

An expenditure of \$1,332 for the funeral of a person who had been an imbecile and inmate of an asylum for years, whose estate was less than \$10,002 was unwarranted. *Ib.*

3. *Funeral expenses.*

In the absence of any direction in the will, an executor or administrator has the right to use his discretion in incurring funeral expenses, but the amount must be reasonable. *Ib.*

4. *Funeral expenses. Personal liability.*

The mere fact that an administrator, or other person, wrote "O. K." on an undertaker's bill, did not bind him personally, because to bind a person making arrangement for the burial of another it should distinctly appear that he agreed to pay the debt. *Ib.*

5. *Limitation of actions. Commencement of suit. Absence from State.*

In view of Thompson's Shannon's Code, section 4012, 4007, requiring creditors of a decedent residing within the State to bring suit against the administrator or executor within two years and six months after the qualification of such personal representative, and section 4455, providing that, if the executor or administrator shall be absent from or reside out of the State, the time of such absence or residence shall not be taken as any part of the time limited for the commencement of the action, the running of limitations may be arrested by filing a bill in chancery against an executor,

EXEMPTIONS.

EXECUTORS AND ADMINISTRATORS—Continued.

although he is temporarily absent, such filing being the beginning of a suit, even though personal process be not then issued, and hence failure to file such a bill in time bars an action by a creditor against an executor to recover on decedent's promissory note. *McFarland v. Bowling*, 691.

EXEMPTIONS.

1. *Garnishment. Statutes. Construction.*

Under Acts 1905, chapter 376, section 2, providing for exemptions from attachment and garnishment of ninety per cent. if the income is less than \$40 per month, the words "per month" and "income" mean the aggregate income during any given calendar month. *Frazier v. Nashville Veterinary Hospital*, 440.

2. *Garnishment. Statutes. Construction.*

Under Acts 1905, chapter 376, section 2, as to exemptions, those who earn less than \$40 per month have ninety per cent. of their wages exempt, and those who earn \$40 per month have \$36 exempt, and are not protected above that sum. *Id.*

3. *Garnishment. Statutes. Construction. "Income."*

Under Acts 1905, chapter 376, section 2, as to exemptions, the amount of income is determined by all the debtor has collected from his employer or received from any other source during the month, as well as the sum that belong to him, earned or collectable, but not actually received. *Id.*

4. *Constitutional law. Class legislation.*

Acts 1905, chapter 376, section 2, providing a ninety per cent exemption for persons with an income of \$40 per month or less, and a maximum exemption of \$36 to persons earning over \$40 per month, is not unfair discrimination, but such classification is reasonable. *Id.*

5. *Garnishment. Rights of creditors.*

Under Acts 1905, chapter 376, the creditor cannot, day by day, or week by week, seize the debtor's income by garnishment, but must wait until a monthly income has accumulated in order to determine the exemption. *Id.*

6. *Garnishment. Statutes.*

Acts 1905, chapter 376, providing the exemptions from execution, attachment, and garnishment, was intended to cover the whole subject of salary, wage, or income exemption and takes the place of all other statutes on those subjects. *Id.*

FIXTURES—GARNISHMENT.

FIXTURES.

1. *Landlord and tenant. Conditional seller. Right of removal. Trade fixtures.*

A company sold machinery to a lessee, retaining title. The machinery was placed on the leased premises in a sheet iron building, and on a concrete foundation, to which it was bolted by nine bolts, imbedded in the concrete, run through prepared holes and confined by nuts. The machinery could be removed from the building at an expense of not more than \$5, but the door of the building was too small to pass the machinery. The removal of two sheets from the side of the building would not materially impair it, as they could be replaced at a trifling cost. The lessee made rents and royalties a lien on the leasehold, fixtures, and improvements, and the lessor retained a lien on future acquired property brought on the premises. *Held*, that if the machinery was a fixture, it was a "trade fixture," so that the seller's right to take possession of and remove the machinery was superior to that of the lessor. *Hart v. Appalachian Washed Coal Co.*, 204.

FORCIBLE ENTRY AND DETAINER.

1. *Nuisance. Private nuisance. Abatement.*

Where one was in actual possession of land under a deed defining its boundaries, his possession was violated when another fenced in a part of the land, and thus erected a private nuisance thereon, so that right of action accrued to him to proceed by forcible entry and detainer, or to abate the nuisance. *Walker v. Davis*, 475.

FRATERNAL INSURANCE.

See BENEFICIAL INSURANCE.

GARNISHMENT.

Exemptions. Rights of creditors.

Under Acts 1905, chapter 376, the creditor cannot, day by day, or week by week, seize the debtor's income by garnishment, but must wait until a monthly income has accumulated in order to determine the exemption. *Frazier v. Nashville Veterinary Hospital*, 440.

See EXEMPTIONS.

GIFTS—GOOD WILL.

GIFTS.

Presumptions. Sufficiency of evidence. Gift of note.

Where proceeds of notes were found on the death of the payee in the hands of one named as executor, and the notes were not indorsed by the payee when collected, the presumption is that they were his property, and a son of the executor, claiming ownership under an alleged gift to the executor for his benefit, has the burden of proof to overcome such presumption by proof that is clear and satisfactory upon every point essential to title by gift. *Allen v. Hays*, 56.

GOOD WILL.

1. *Nature of right. Protection.*

"Good will" is property in the sense of being a thing subject to be damaged, and an injunction will lie to protect it when the seller of the good will thereafter wrongfully interferes with it or the property conveyed of which the good will is an incident. *Fine v. Lawless*, 160.

2. *Sale. Stipulation.*

Upon a sale of the good will of a business without more, the seller is not precluded from setting up a precisely similar business at another stand in the same locality, and if the purchaser desires to forestall such step he must expressly stipulate against it. *Ib.*

3. *Sales. Protection. "Tenant right of renewal."*

Where the seller of a business conducted in demised premises assigned the lease and conveyed the "good will," which includes the possibility that old customers will resort to the place and any other positive advantage acquired arising out of the business of the old firm whether connected with the premises where it was carried on or with the name of the late firm; the seller is under an implied obligation not to interfere with the purchaser in his use of the business premises and control of the lease assigned, for that constitutes a part of the good will, and hence, as the purchaser by reason of the assignment of the lease acquired what is known as a "tenant-right" in respect to renewal of the lease, which is the likelihood of a tenant obtaining a renewal though the lease contains no such provision, it was a breach of good faith for the seller during the existence of the lease to obtain a new lease running to him to commence on expiration of the one assigned. *Ib.*

GUARDIAN AD LITEM—HIGHWAYS.

GUARDIAN AD LITEM.

Divorce. Parties.

In a proceeding by a father to obtain the custody of his child from his divorced wife, a minor, the court properly refused to appoint a guardian *ad litem* for the wife, since her personal rights and those of the child may be properly protected without such guardian. *Kenner v. Kenner*, 211.

GUARDIAN AND WARD.

See INSANE PERSONS.

HABEAS CORPUS.

1. *Custody of child. Juvenile court judgment.*

Under Thompson's Shannon's Code, section 5503, giving authority to any judge of the circuit, common-law, or criminal courts, or to any chancellor to issue a writ of *habeas corpus*, where the juvenile court, in a proceeding under Acts 1911, chapter 58, entered a judgment awarding custody of a child, the questions determined in such proceeding cannot be again litigated in a *habeas corpus* proceeding, by the same parties, on the same state of facts. *State ex rel. v. West*, 522.

2. *Purpose of writ.*

The writ of *habeas corpus* cannot be made to serve the purpose of an appeal or writ of error. *Ib.*

3. *Custody of child. Juvenile court judgment. Res adjudicata.*

Where the juvenile court entered a judgment that a child was delinquent, questions determined in such proceeding cannot be again reviewed in *habeas corpus* by the mother of the child, assuming that the proceedings of the juvenile court were valid, since the question of the child's custody was *res adjudicata*. *Juvenile Court of Shelby County v. State ex rel.*, 549.

HIGHWAYS.

1. *Constitutional law. Due process of law.*

Priv. Acts 1915, chapter 564, section 20, requiring the owner to furnish a wagon and team for road work, and feed therefor, does not violate Constitution article 1, section 8, providing that no man shall be deprived of his property, but by the judgment of his peers and the law of the land. *Galoway v. State*, 484.

2. *Eminent domain. Taking property for road work.*

Neither does it, as to the wagon and team, violate Constitution article 1, section 21, forbidding the taking of property for public use without compensation; but as to the feed it does. *Ib.*

HIGHWAYS.

HIGHWAYS—Continued.

3. *Work on road. Impressment of wagons and teams.*

The impressment of the wagon and team under the statute does not depend on the owner's liability to perform personal service. *Galoway v. State*, 484.

4. *Use. Automobiles.*

The general principles applicable to the use of all vehicles upon public highways apply to automobiles in the absence of special statutes regulating their use. *Coco-Cola Bottling Works v. Brown*, 640.

5. *Use. Automobiles.*

The right of the driver of a horse and that of the driver of a motor vehicle to use the highway are equal, and each is restricted in the exercise of his rights by the corresponding rights of the other. *Ib.*

6. *Automobiles. Care.*

An automobile operator must keep his machine always under control so as to avoid collision with other persons using the highway, and cannot assume that the road is clear, and, although he may assume that others will use due care, he is under like duty with respect to every one else. *Ib.*

7. *Automobiles. Frightening animals.*

Whenever a person operating an automobile knows, or in the exercise of ordinary care should know, that his machine is frightening a horse, or, in the situation in which he has left it, is likely to frighten a horse, he is bound at his peril to exercise due care to prevent an injury. *Ib.*

8. *Automobiles. Frightening horse. Evidence.*

Where plaintiff's horse was frightened by noise of an automobile engine while the care was halted at side of road, intention of the operators to eat their lunches while the car was halted during period of twenty minutes could be considered in determining whether they exercise due care. *Ib.*

9. *Automobiles. Frightening horse. Gross negligence.*

It was gross negligence to leave the motor of an automobile running while the vehicle was stopped just off the roadway at an elevated point, where horses being frightened might cause damage during a period of twenty minutes while the operators were eating their lunch. *Ib.*

10. *Automobiles. Frightening horse. Assumption of risk.*

The driver of a horse upon the public road assumes the risk of

HOMICIDE—INDICTMENT AND INFORMATION.

HIGHWAYS—Continued.

its taking fright at an automobile when operated properly and with due care. *Ib.*

See NEGLIGENCE.

HOMICIDE.

1. *Dying declarations. Admissibility.*

The victim of the murder was shot at close quarters with a shotgun, and his wounds were very large and of a desperate nature. He received the wound late in the evening and lived until the following day. The physicians who visited him the following morning informed him that he would have a bare chance for recovery if he submitted to an operation. He protested against the operation; said it was no use; that he was going to die. After some further talk he ceased objecting to the operation and made the statement admitted in evidence. He never at any time manifested any hope, and while the anæsthetic was being administered again protested; said it was useless, and he was going to die. *Held*, the declaration was admissible, since the victim regarded his death as inevitable and imminent at the time he made the declaration, and was without hope of recovery, the bare circumstance that he consented to an operation not indicating that he entertained hope of recovery. *Dickason v. The State*, 601.

2. *Dying declarations. Sense of impending death. How shown.*

The sense of impending death may be shown by the language of deceased, or inferred from the character of the wound, or set up by the testimony of physicians or other attendants. *Ib.*

HUSBAND AND WIFE.

Indictment and information. Wife as prosecutrix. Nonsupport.

In view of Thompson's Shannon's Code, section 4505, providing deserted wife may sue and be sued, a deserted wife may be prosecutrix on an indictment against her husband for nonsupport under Acts 1915, chapter 125. *Moye v. The State*, 680.

See CONSTITUTIONAL LAW; CURTESY.

INDICTMENT AND INFORMATION.

Wife as prosecutrix. Nonsupport.

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INFANTS—INSANE PERSONS.

INFANTS.

1. *Contracts. Validity. Want of consideration.*

As a minor is prejudiced by sale without advertisement of furniture bought on the installment plan, under Acts 1911, chapter 8, section 1, his agreement, waiving advertisement, is void; there being no consideration for such a waiver except the cost of advertisement. *Ward v. Sharpe*, 347.

2. *Criminal responsibility. Presumptions.*

The presumption of incapacity of a child to commit a crime is conclusive when the child is under the age of seven years; and, if between seven and fourteen, the burden is on the State to show that the child is capable of appreciating the nature of his acts. *Juvenile Court of Shelby County v. State ex rel.*, 549.

3. *Presumptions. Criminal responsibility.*

In a proceeding in the juvenile court for delinquency of a child alleged to have killed his playmate, the age of the child is immaterial; the procedure not being criminal. *Ib.*

See JUVENILE COURTS.

INJUNCTIONS.

Good will. Nature of right. Protection.

"Good will" is property in the sense of being a thing subject to be damaged, and an injunction will lie to protect it when the seller of the good will thereafter wrongfully interferes with it or the property conveyed of which the good will is an incident. *Fine v. Lawless*, 160.

See JUDGMENT; JURISDICTION.

INSANE PERSONS.

1. *Actions. Parties. Next friend.*

A suit may be brought in behalf of a person of unsound mind by a next friend in the name of such person, either before or after inquisition of lunacy, where no guardian or committee has been appointed. *Williams v. Gaither*, 587.

2. *Actions by next friend. Subsequent guardian. Control of action.*

In a suit brought by the next friend of an insane person, his subsequently appointed guardian had the right to control the suit by being substituted for the next friend, but could not appear otherwise and have the suit dismissed at the cost of the next friend. *Ib.*

INSTRUCTIONS—INSURANCE.

INSANE PERSONS—Continued.

3. *Actions. Next friend. Substitution.*

A next friend bringing a suit for an insane person is in a sense a volunteer, and the court of pendency may at any time investigate his fitness to represent the incompetent's interests, may allow or direct that some one else be substituted in his place and will ordinarily substitute a subsequently appointed guardian upon application. *Ib.*

4. *Actions. Costs.*

A guardian appointed subsequent to a suit by her insane ward by his next friend should not be allowed to dismiss the suit without payment of costs. *Ib.*

INSTRUCTIONS.

1. *Death. Wrongful death. Self-defense.*

In an action for wrongful death defended on the ground of self-defense, the court charged that, if the jury should find defendant was not in peril, and it was unnecessary to fire to protect himself, still, if they should find that the situation or happenings were such as to lead a prudent and cautious man to believe he was in danger, even though he was not, the law would not hold him liable. *Held* that failure to prefix the word "reasonably" to the words "prudent and cautious" therein was reversible error, as placing an undue burden on defendant. *Hunt-Berlin Coal Co. v. Paton*, 611.

2. *Death. Wrongful death. Self-defense.*

In an action for death defended on the ground of self-defense, a statement in the charge that, if decedent did not make the assault on defendant which led him necessarily and reasonably to believe that his life was imperiled, or that he was in danger of great bodily harm, he had no right to fire, was erroneous in using the word "necessarily" as conveying to the minds of the jurors the fact that defendant was not warranted in shooting until circumstances were such as to compel him to believe his life was imperiled. *Ib.*

See APPEAL AND ERROR; TRIAL.

INSURANCE.

1. *Fraternal insurance. Exhaustion of remedies.*

Where the right to a funeral benefit against a fraternal order is involved, the beneficiary may sue without appealing to the judicatories within the order, though the by-laws provided for

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Where the right to a funeral benefit against a fraternal order is involved, the beneficiary may sue without appealing to the judicatories within the order, though the by-laws provided for

INSURANCE.

INSURANCE—Continued.

appeals therein, if they did not expressly inhibit suit in the courts before exhaustion of the remedies within the order. *Honea v. American Council, J. O. U. A. M.*, 21.

2. *Fraternal insurance. Right to recover. Time of reinstatement.*

Under by-laws of fraternal order, entitling beneficiary to receive funeral benefits for the death of a member, not caused from any disease which had demonstrated itself prior to his reinstatement, the beneficiary of a member who had been suspended and whose fatal illness demonstrated itself after he applied for reinstatement but before he was finally enrolled on the books of the National Council, could not recover the death benefit. *Ib.*

3. *Fraternal insurance. Right to benefits.*

Where beneficiary of member of fraternal order who had been suspended lost right to recover against national council by delay in enrollment after reinstatement, she could not recover against the local council whose by-laws postponed right to benefits until three months after reinstatement; the member having died before expiration of such time. *Ib.*

4. *Liability insurance. Extent of insurer's liability. "At its own expense."*

Under a policy insuring against loss from claims for personal injuries, limiting the insurer's liability on account of one accident to \$5,000, and reserving to the insurer the right to assume the management and defense of suits for such injuries, and providing that when it assumed such defense it would defend at its own expense, the moneys expended in such defense not to be included in the limit of liability previously fixed, the insurer was liable for taxable costs in addition to the \$5,000; such costs being a part of the costs of defense, and the expression "at its own expense" meaning practically the same as "at the cost" of the insurer. *Casey-Hedges Co. v. Southwestern Surety Co.*, 63.

5. *Liability insurance. Extent of liability. "Moneys expended in defense."*

Under such policy, where an appeal was taken from a judgment recovered against insured on the claim for personal injuries, the insurer was liable for the interest accruing on the portion of the judgment for which it was liable; such interest coming within the term "moneys expended in said defense," which by the policy were to be excluded from the limitation of liability. *Ib.*

INTERPLEADER—JUDGMENT.

INTERPLEADER.

Who may maintain. Trespass.

Where an admitted trespasser had mined coal on land claimed by two other parties, and both sued, the trespasser could not maintain a bill of interpleader, or a bill in the nature of a bill of interpleader, to determine to whom it was indebted. *Fuel & Iron Co. v. Leonard*, 648.

INTERSTATE COMMERCE.

See CARRIERS; COMMERCE.

JUDGES.

County court. Chairman. Qualifications.

Under Constitution, article 6, section 1, vesting the judicial power of the State in the supreme court and other courts, and "in justices of the peace," Thompson's Shannon's Code, section 221, providing that a court to be called the county court is established in each county, composed of the magistrates, section 5992, providing that the county court consists of the justices of the county, and section 493, providing that every county is a corporation, and the justices of the county court are the representatives of the county, no one is eligible for the office of chairman of the county court who is not a justice of the peace of the county. *State ex rel. v. Howard*, 73.

JUDGMENT.

1. *Motion in arrest. Grounds.*

Where declaration averred that sum "was due by a promissory note here to the court shown, . . . of which note defendant was indorser," and proof showed that the note contained waiver of protest, notice of dishonor and presentation by indorser, indorser's motion in arrest could not be granted in view of Acts 1911, chapter 32 (Thompson's Shannon's Code, section 4902a1), providing that no judgment shall be set aside for any error in procedure, unless in the opinion of the court, after an examination of the entire record, it shall affirmatively appear that the error affected the result of the trial. *Waterhouse v. Furniture Co.*, 117.

2. *Injunction. Decree. Reserving right to correct claim.*

On a bill by a lumber company to enjoin a railroad's sale of collateral upon default in the payment of a note given the railroad for constructing a logging road, where it appeared that complainant might have a just claim in some amount not shown by the

JUDICIAL NOTICE—JURISDICTION.

JUDGMENT—Continued.

record for an overcharge on cars equipped with standards placed on gondola and flat cars, the decree entered should reserve to it the right to litigate such claim in a court, or before the Interstate Commerce Commission, as it might be advised. *Carolina Spruce Co. v. Black Mountain R. Co.*, 137.

3. *Interlocutory order. Dismissal. Effect.*

An interlocutory order pending divorce suit concerning temporary custody of the child is abolished by voluntary dismissal of the suit, and cannot be *res adjudicata*, since it was never a final decree. *Kenner v. Kenner*, 211.

4. *Collateral attack.*

A decree of partition between a life tenant and remaindermen is utterly void, and can be collaterally attacked by remaindermen in a foreclosure action against land assigned to life tenant by the decree and mortgaged by him. *Chickamauga Trust Co. v. Lonas*, 228.

5. *Pledges. Foreclosure. Distribution of proceeds.*

Where mortgage bonds securing a promissory note are ordered to be foreclosed, and the note provides for attorney's fees, the decree should fix the basis of distribution of the sale, including such attorney's fees. *Carolina Spruce Co. v. Black Mountain R. Co.*, 248.

See CERTIORARI; JUVENILE COURTS; REPLEVIN.

JUDICIAL NOTICE.

See EVIDENCE.

JURISDICTION.

1. *Divorce. Residence of parties. Fraud.*

Although, where plaintiff went to a foreign jurisdiction solely for the purpose of instituting divorce proceedings on service by publication, the decree may be attacked for fraud by action in a foreign State, yet such attack cannot be sustained where the plaintiff removed with the *bona-fide* purpose of making a home in such State. *Kenner v. Kenner*, 211.

2. *Divorce. Service by publication.*

Jurisdiction of the defendant in divorce may be acquired in the foreign State by publication or other substituted service, although the defendant is a nonresident, and never has been in the State where suit was brought. *Id.*

JUSTICES OF THE PEACE—JUVENILE COURTS.

JURISDICTION—Continued.

3. *Injunction. Acts of juvenile court officers.*

A court of equity has no jurisdiction to restrain officers of a juvenile court established under Acts 1911, chapter 58, from carrying out a threat to make a child a ward of the court, whether the proceeding is civil, criminal, or semicriminal, because the juvenile court is one of record, and no property rights are involved, and if the juvenile court will not do justice, there is a remedy by appeal. *Kilgrew v. West*, 517.

4. *Infants. Juvenile court.*

Under Pub. Acts 1911, chapter 58, requiring that if a child brought before the juvenile court is probably guilty of murder in either degree, he shall be turned over to the county authorities to be proceeded against according to criminal law, the juvenile court has no jurisdiction of an infant alleged to have committed homicide if the judge thinks he is probably guilty. *Juvenile Court of Shelby County v. State ex rel.*, 549.

See COURTS; DIVORCE; JUVENILE COURTS.

JUSTICES OF THE PEACE.

Executions. Liens.

The levy of an execution from a justice's judgment upon land creates a lien in favor of the judgment creditor. *Hammock v. Qualls*, 388.

See JUDGES.

JUVENILE COURTS.

1. *Infants. Juvenile delinquents. Appeal from judgment. Jurisdiction of supreme court. Statute.*

Under Acts 1911, chapter 58, providing for juvenile courts, and outlining their jurisdiction, containing no provision for appeal from the judgments of the juvenile courts created, the supreme court is without jurisdiction of an appeal in the nature of a writ of error prosecuted by one adjudged by the juvenile court of a county to be a delinquent child. *State v. Bockman*, 422.

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JUVENILE COURT.

JUVENILE COURTS—Continued.

volved, and if the juvenile court will not do justice, there is a remedy by appeal. *Kilgrow v. West*, 517.

3. *Habeas corpus. Custody of child. Judgment.*

Under Thompson's Shannon's Code, section 5503, giving authority to any judge of the circuit, common-law, or criminal courts, or to any chancellor to issue a writ of *habeas corpus*, where the juvenile court, in a proceeding under Acts 1911, chapter 58, entered a judgment awarding custody of a child, the questions determined in such proceeding cannot be again litigated in a *habeas corpus* proceeding, by the same parties, on the same state of facts. *State ex rel. v. West*, 522.

4. *Certiorari. Review of proceedings in.*

Proceedings in the juvenile court must be reviewed in the circuit court by *certiorari*. *Ib.*

5. *Habeas corpus. Certiorari. Proceedings as to custody of child.*

Statutory *certiorari* from the circuit court lies to review the action of the juvenile court in proceedings involving the custody of a child, and statutory *certiorari* will issue, that the case may be tried again upon its merits in the circuit court, and not the common-law writ of *certiorari*, which opens for review merely the legality of the action of the inferior tribunal. *Jones v. State ex rel.*, 547.

6. *Habeas corpus. Custody of child. Judgment. Res adjudicata.*

Where the juvenile court entered a judgment that a child was delinquent, questions determined in such proceeding cannot be again reviewed in *habeas corpus* by the mother of the child, assuming that the proceedings of the juvenile court were valid, since the question of the child's custody was *res adjudicata*. *Juvenile Court of Shelby County v. State ex rel.*, 549.

7. *Infants. Proceedings. Necessity of notice.*

In a proceeding under Pub. Acts 1911, chapter 58, section 10, on arrest of an infant for homicide, the juvenile court proceedings were not void, for failure to give mother of the boy notice where she was present at the hearing and was examined as a witness, since she thereby entered her appearance and waived the statutory requirement of notice. *Ib.*

8. *Infants. Orders. Requisite. Sufficiency.*

The juvenile court is a court of special and limited jurisdiction, and its judgments or decrees should show the facts upon which its jurisdiction rests, such as the age of the child, the nature of the proceedings, the service of notice, and the statutory circumstances of delinquency. *Ib.*

LANDLORD AND TENANT.

JUVENILE COURTS—Continued.

9. *Infants. Purpose of proceedings.*

Proceedings in the juvenile court are not criminal in their nature, and are not instituted to punish the child, but to provide for his welfare. *Ib.*

10. *Infants. Presumptions. Criminal responsibility.*

In a proceeding in the juvenile court for delinquency of a child alleged to have killed his playmate, the age of the child is immaterial; the procedure not being criminal. *Ib.*

11. *Infants. Jurisdiction.*

Under Pub. Acts 1911, chapter 58, requiring that if a child brought before the juvenile court is probably guilty of murder in either degree, he shall be turned over to the county authorities to be proceeded against according to criminal law, the juvenile court has no jurisdiction of an infant alleged to have committed homicide if the judge thinks he is probably guilty. *Ib.*

See COURTS.

LANDLORD AND TENANT.

1. *Renewal. "Tenant-right of renewal."*

While a tenant in possession whose lease contains no provision for renewal cannot compel a renewal, nevertheless he has such a likelihood of procuring a renewal, which is called a "tenant-right of renewal," that equity will protect it. *Fine v. Lawless*, 160.

2. *Good will. Sales. Protection. "Tenant right of renewal."*

Where the seller of a business conducted in demised premises assigned the lease and conveyed the "good will," which includes the possibility that old customers will resort to the place and any other positive advantage acquired arising out of the business of the old firm whether connected with the premises where it was carried on or with the name of the late firm; the seller is under an implied obligation not to interfere with the purchaser in his use of the business premises and control of the lease assigned, for that constitutes a part of the good will, and hence, as the purchaser by reason of the assignment of the lease acquired what is known as a "tenant-right" in respect to renewal of the lease, which is the likelihood of a tenant obtaining a renewal though the lease contains no such provision, it was a breach of good faith for the seller during the existence of the lease to obtain a new lease running to him to commence on expiration of the one assigned. *Ib.*

LIABILITY.

LIABILITY—Continued.

extent as the government, which is not liable for the consequential damages to a tenant at will of one who has been compensated for land taken, by alternate overflow and recession of water, causing stagnation and breeding mosquitoes which infected plaintiff and his family with malaria. *C. & T. R. Power Co. v. Lawson*, 854.

3. *United States. Dams. Consequential damages. Contractor's liability for torts.*

Such contractor, being liable only to the same extent as the government, it is not liable for the tort of failing to remove obstructions and rubbish after each overflow, since the United States is not liable for torts. *Ib.*

4. *United States. Dams. Liability of contractor.*

Under agreement of such contractor to save the United States harmless on account of any damage, it was liable only to the same extent as the United States. *Ib.*

5. *United States. Dams. Appropriation of lands. Torts.*

Where a dam was erected for the United States in navigable stream and alternate overflow and recession caused by stagnant pool on land of a private owner, the United States was not liable for failure to drain the pool, since it had no right to go upon private lands for such purpose. *Ib.*

6. *Nuisance. Dams. Contractor's liability.*

That a dam erected for the United States in navigable waters created unhealthful conditions by making stagnant pools of water did not make it a nuisance, nor render the contractor liable as for maintaining a nuisance. *Ib.*

7. *United States. Dams. Consequential damages. Liability of contractor.*

That a private contractor building dam to be deeded to the United States in navigable stream under direction and according to specifications of the United States retained an interest in the surplus water for power production did not render it liable for merely consequential damages to residents of the vicinity by reason of creation of unhealthful and malarial conditions. *Ib.*

8. *Railroads. Separate accommodations for races. Statutes. Construction.*

A railroad which maintained a dining car, intending to serve white and negro passengers at different hours, was liable to a white passenger, when it permitted negroes to be served while she was in the car, only for its negligence in making a call to

 LICENSES.

LIABILITY—Continued.

the dining car for white persons at the time when negroes were about to be served. *Shelton v. O., R. I. & P. R. Co.*, 378.

9. *Negligence. Proximate cause. Concurrent causes.*

Where two causes proximately contribute to an injury sued for, for only one of which defendant is responsible, and with the other of which neither party is chargeable, defendant must be held liable. *Columbia & Big Bigby Turnpike Co. v. English*, 634.

 LICENSES.

1. *Nature of "license." Occupation tax.*

A "license," in its truer sense is issued under the police power, not for revenue, but for regulation, while a license may be issued on payment of an "occupation tax" levied under Constitution article 2, section 28, conferring power to tax privileges, revenue being its primary object, though regulation may be incidental; power exercised in the first case being to license and in the other to tax and license. *McMillan v. City of Knoxville*, 319.

2. *Nature of "occupation tax."*

An "occupation tax" is levied primarily for revenue, and in instances for regulation incidentally. *Ib.*

3. *Employment agencies. Statutes. Repeal.*

It was competent for the legislature to provide a regulatory license for and also an occupation tax on employment agencies, the two not being inconsistent or impinging on each other; and hence Pub. Acts 1917, chapter 78, providing for the regulation and supervision of "employment agencies," and requiring one engaging in such business to pay a fee and obtain a license, did not repeal Pub. Acts 1917, chapter 70, taxing the business of emigrant agents. *Ib.*

4. *Constitutional law. Operations. Amendment.*

It was competent for the legislature to add to whatever regulation was created in the imposition of a privilege or occupation tax on employment agencies under Pub. Acts 1915, chapter 101, and Pub. Acts 1917, chapter 70, by providing for more detailed policing regulation thereof in Pub. Acts 1917, chapter 78. *Ib.*

5. *Nature of fee. Distinction from occupation tax.*

A true license fee, as contradistinguished from an occupation tax, should be fixed to cover the expense of issuing it, the services of officers and other expenses directly or indirectly incident to supervising the particular business of occupation. *Ib.*

LICENSES.

LICENSES—Continued.

6. Occupation tax. Employment agencies.

A license issued to an employment agent on payment of an occupation tax under Pub. Acts 1915, chapter 101, levied primarily for revenue, did not preclude the State and a city from denying him the privilege of continuing the emigrant feature of his business thereunder until its expiration without payment of the tax on emigrant agents imposed by Pub. Acts 1917, chapter 70, and a city ordinance. *McMillan v. City of Knoxville*, 319.

7. Constitutional law. Statutes. Modification or repeal.

A licensee is bound to know that his license or permit, issued on payment of a tax primarily for revenue, is held subject to modification or repeal of the law under which it was issued, from the making of which change if the public welfare required it, no incidental inconvenience to him would stay the law. *Ib.*

8. Constitutional law. Statutes. Due process of law. Compensation. Uniform taxation. General laws.

Acts 1907, chapter 32 (Thomp. Shan. Code, section 2853a2 et seq.), requiring registration and license fee of \$3 in order to keep a female dog, the fees over expenses to go to the school fund, does not contravene Const. article 1, section 8, 21, article 2, section 28, nor article 11, section 8, providing that property shall not be taken without a judgment of peers of the land, or without compensation, that taxes shall be uniform, and prohibiting special laws. *State v. Erwin*, 341.

9. Privilege tax. Oil tanks.

Revenue Law (Laws 1915, chapter 101), imposing a tax on persons having oil tanks, etc., for the purpose of selling, delivering, or distributing oil, is inapplicable to a petroleum manufacturer and refiner maintaining storage tanks merely as a part of its manufacturing establishment and making only a manufacturer's profit. *General Refining & Producing Co. v. Davidson County*, 401.

10. Occupation tax. Shaving rates.

One who sold cattle at true cash value to a holder of notes which were taken without discount at their face value with interest was not engaged in the business of shaving notes in such transaction, so as to require a license, and could sue on the notes, although he had shaved notes on other transactions. *Evans v. Williams*, 677.

11. Occupation tax. Burden of proof.

The burden is on one who obtains notes from a holder in exchange for property to clearly show that he was not engaged in the

 LIENS—LIMITATION OF ACTIONS.

LICENSES—Continued.

business of shaving notes without a license; the presumption being, in the absence of other evidence, that they were obtained in the exercise of the taxable privilege. *Ib.*

See CONSTITUTIONAL LAW.

LIENS.

1. *Execution. Date.*

If the levy of an execution from a justice's judgment is followed by condemnation and issue of *venditioni exponas* by the circuit court, the sale had in pursuance thereof relates back to the date of the levy, and the legal title conveyed by the sheriff's deed operates from that date. *Hammock v. Qualls*, 388.

2. *Execution. Real estate. Effect of levy.*

The levy of an execution upon real estate does not transfer the title to the land, nor create any interest in the sheriff, but merely fixes a lien upon the land for the payment of the debt. *Ib.*

3. *Execution. Lis pendens. Effect.*

The record of condemnation in the circuit court after levy of execution under a justice's judgment merely continues the lien of the levy to which the purchaser's title will relate when he procures a deed from the sheriff. *Ib.*

4. *Secret liens.*

Secret liens are not favorites of the law. *Ib.*

5. *Attorney and client. Lien for services. Waiver.*

Where an attorney, otherwise entitled to a charging lien on a judgment recovered, takes an assignment to himself of the entire judgment, he abandons or waives his rights to enforce the lien; the claim to a lien being merged in the specific assignment of the whole judgment. *Jernigan Bros. v. Hart*, 515.

6. *Attorney and client. Lien for fees.*

Attorneys who properly brought a suit for an insane person by his next friend have a lien upon the cause of action for their fees. *Williams v. Gaither*, 587.

See EXECUTION; TAXATION; LANDLORD AND TENANT.

LIMITATION OF ACTIONS.

Commencement of suit. Absence from State.

In view of Thompson's Shannon's Code, sections 4012, 4007, requiring creditors of a decedent residing within the State to bring suit against the administrator or executor within two years and

 LIS PENDENS—MASTER AND SERVANT.

LIMITATION OF ACTIONS—Continued.

six months after the qualification of such personal representative, and section 4455, providing that, if the executor or administrator shall be absent from or reside out of the State, the time of such absence or residence shall not be taken as any part of the time limited for the commencement of the action, the running of limitations may be arrested by filing a bill in chancery against an executor, although he is temporarily absent, such filing being the beginning of a suit, even though personal process be not then issued, and hence failure to file such a bill in time bars an action by a creditor against an executor to recover on decedent's promissory note. *McFarland v. Bowling*, 691.

LIS PENDENS.

Vendor and purchaser. Priority of deeds.

In all cases subject to the registration laws, the deed first registered has priority over constructive notice of *lis pendens*. *Hammock v. Qualls*, 388.

MASTER AND SERVANT.

Contributory negligence not precluding recovery.

Where a servant was guilty of contributory negligence, his recovery is not precluded by the federal Employers' Liability Act. *C., N. O. & T. P. Ry. Co. v. Morgan*, 27.

2. *Negligence. Discovered peril. Contributory negligence.*

Contributory negligence of a workman in working in a place apparently dangerous because near a heavy smokestack being erected in such manner that there was danger of its falling did not relieve the erector from liability for death of the workman by fall of the smokestack, where, knowing the workman's position, the erector proceeded with the work, constantly increasing the workman's peril; such conduct by the erector being willfulness or wantonness. *Cash v. Casey-Hedges Co.*, 179.

3. *Safe place to work. Assurance of foreman.*

Where the employee of one contractor, apprehensive of danger of falling of smokestack being erected by another contractor near his place of work, continued at work on being told by his foreman that it was safe, his employer was liable for the workman's death by smokestack's falling, notwithstanding the accident was primarily due to negligence of a third party, over whom the employer had no control; the workman having the right to rely on the foreman's statement as an assurance that his employer had furnished him a safe place to work. *Id.*

MECHANICS' LIENS.

MASTER AND SERVANT—Continued

4. *Fellow servants. Injuries to servant. Defective appliances.*

Where cores are selected, inspected, and prepared by employees of another department, without supervision except the general supervision over both departments, a molder cannot recover for injuries from loaded defective cores coming to him, especially where he has an opportunity to inspect and select from the cores prepared. *Casey-Hedges Co. v. Gates*, 282.

5. *Unlawful employment. Suit for injuries.*

Plaintiff, a minor eleven years old, employed by defendant to distribute meats to customers, injured while feeding a sausage mill in defendant's place of business, was within the protection of Thompson's Shannon's Code, section 4342a-44 (Acts 1911, chapter 57, section 1), making it unlawful to employ any child less than fourteen years old "in the distribution or transportation of merchandise." *Harrison v. Roscoe*, 511.

6. *Injury to third person. Scope of employe's duty.*

It was outside the scope of the duty of a yardmaster of a coal company in admitting an employee of a light company to inspect a meter to engage in a dispute with him relative to the demerits of their respective employers in course of which he was provoked into killing the inspector, and, on these facts appearing in an action for his death, the coal company was entitled to a peremptory instruction. *Hunt-Berlin Coal Co. v. Paton*, 611.

MECHANICS' LIENS.

1. *Notice of claim. Time.*

A materialman or worker must either serve notice of claim within thirty days after furnishing the last material or of expiration of worker's contract, or within thirty days after completion of the building, to obtain a lien, and service of notice between such periods, even if within thirty days after abandonment of the work by the contractor, is void, under Thom. Shan. Code, section 3540. *Bird Bros. v. Southern Surety Co.*, 11.

2. *Notice of claim. Necessity for.*

Filing of an intervening petition, in action by owner to ascertain mechanics' liens, within thirty days after completion of a building, does not give a materialman or worker a lien when no valid notice of claim has been served, under Thom. Shan. Code, section 3540, relating to notice to owner. *Ib.*

MORTGAGES—MOTION FOR NEW TRIAL.

MECHANICS' LIENS—Continued.

3. *Indemnity against lien. Bond of contractor. Liability of surety.*

A bond conditioned that surety shall indemnify the owner for "loss resulting from the enforcement of mechanics' liens" does not render the surety liable for attorney's fees and costs from attempted enforcement of liens which failed because proper notice of claim was not given. *Bird Bros. v. Southern Surety Co.*, 11.

4. *Lumber used for temporary purposes. Right to lien.*

Under Thompson's Shannon's Code, section 3531, providing for a lien in favor of one who furnishes material for the building contemplated, plaintiff, who in good faith furnished lumber, believing that it was to be used in a permanent structure, would be entitled to a lien, although the lumber was used in making forms for concrete, and at least seventy-five per cent. was unable at another place on completion of the work for defendants. *York Lumber & Mfg. Co. v. McKnight & Mertz*, 687.

MORTGAGES.

1. *Life estates. Validity.*

Where life tenant mortgaged land assigned to him under a void partition decree, the mortgage was valid as against the interest of the life tenant in the land covered by the trust deed, although void as against remaindermen. *Chickamauga Trust Co. v. Lonas*, 228.

2. *Foreclosure sale. Attorney's fees.*

Reasonable fees for a mortgagee's or trustee's attorney may be retained out of the proceeds of a foreclosure sale when provided for in the mortgage. *Carolina Spruce Co. v. Black Mountain R. Co.*, 248.

3. *Pledges. Foreclosure. Distribution of proceeds.*

Where mortgage bonds securing a promissory note are ordered to be foreclosed, and the note provides for attorney's fees, the decree should fix the basis of distribution of the sale, including such attorney's fees. *Ib.*

See CURTESY.

MOTION FOR NEW TRIAL.

See APPEAL AND ERROR; NEW TRIAL.

MUNICIPAL CORPORATIONS.

MUNICIPAL CORPORATIONS.

1. *Liability for torts of independent contractor.*

A municipality was not liable for death caused by fall of a smokestack being erected under contract, where such erection was not necessarily dangerous when done with care by persons having skill, and the municipality did not know the contractor was incompetent and did not control the methods or appliances of the contractor in performing the work. *Cash v. Casey-Hedges, Co.*, 179.

2. *Public buildings. Bonds of contractors. Rights to sue.*

Where a contractor on a public building gave a bond securing performance and also payment of materialmen and laborers, and he defaulted in both respects, the city could sue on its own claim for the additional cost of completion, and also in behalf of the laborers and materialmen whose claims were unpaid. *City of Bristol v. Bostwick*, 304.

3. *Public buildings. Contractor's bonds. Rights to sue.*

Though the city had in its hands and due the contractor more than enough money to pay, all labor and material claims, its suit on the contractor's bond, securing both performance and payment of claims, setting up his abandonment of the contract and the additional cost of completion and the liens and claims of labor and materialmen, was not premature. *Id.*

4. *Bond issues. Validity.*

Under Constitution 1870, article 2, section 29, providing that the legislature may authorize municipalities to tax for county and corporate purposes in such manner as shall be prescribed by law, but that a municipality's credit shall not be pledged in aid of any person, etc., unless such action be authorized at an election, no election is necessary where the municipality directly taxes for a direct public purpose unless the statute specifically so requires. *Berry v. Shelby County*, 532.

5. *Bond issues. Validity.*

Under Constitution 1870, article 2, section 29, providing that a municipality's credit shall not be given or loaned unless such action be approved at an election, the statute authorizing the loans of credit must provide for the election. *Id.*

See CONTRACTS; OFFICERS.

 NEGLIGENCE.

NEGLIGENCE.

 1. *Master and servant. Question for jury.*

Where an engine hostler was struck and injured by the dropping of a hood on a smokestack by an inspector of equipment, the question of negligence of the company was one of fact for the jury, on the inference that the inspector or his helpers, if exercising due care, would have seen the hostler and avoided the injury. *C., N. O. & T. P. Ry. Co. v. Morgan*, 27.

 2. *Duty to warn.*

Where, in the erection of a heavy smokestack by a gin pole and ropes and pulleys, there was danger of its falling, the erector was bound to warn every person near enough to be struck in case it fell. *Cash v. Casey-Hedges Co.*, 179.

 3. *Discovered peril. Contributory negligence.*

Contributory negligence of a workman in working in a place apparently dangerous because near a heavy smokestack being erected in such manner that there was danger of its falling did not relieve the erector from liability for death of the workman by fall of the smokestack, where, knowing the workman's position, the erector proceeded with the work, constantly increasing the workman's peril; such conduct by the erector being willfulness or wantonness. *Ib.*

 4. *Railroads. Animals on tracks. Duties of engineer.*

After those in charge of the train observe frightened animals on the track or near by, it is incumbent on them to use ordinary care in operating the train, and if they approach negligently and further frighten the animals and cause injury, the railroad is liable. *N., C. & St. L. Ry. Co. v. Ford*, 505.

 5. *Railroads. Animals on track. Evidence.*

Evidence held insufficient to show negligence in operation of a train by which mules on the track were frightened and caused to be injured on a trestle. *Ib.*

 6. *Proximate cause. Concurrent causes.*

Where two causes proximately contribute to an injury sued for, for only one of which defendant is responsible, and with the other of which neither party is chargeable defendant must be held liable. *Columbia & Big Bigby Turnpike Co. v. English*, 634.

 7. *Highways. Automobiles. Care.*

An automobile operator must keep his machine under control so as to avoid collision with other persons using the highway, and cannot assume that the road is clear, and, although

NEGLIGENCE.

NEGLIGENCE—Continued.

he may assume that others will use due care, he is under like duty with respect to every one else. *Coca Cola Bottling Works v. Brown*. 642.

8. *Highways. Automobiles. Frightening animals.*

Whenever a person operating an automobile knows, or in the exercise of ordinary care should know, that his machine is frightening a horse, or, in the situation in which he has left it, is likely to frighten a horse, he is bound at his peril to exercise due care to prevent an injury. *Ib.*

9. *Highways. Automobiles. Frightening horse. Evidence.*

Where plaintiff's horse was frightened by noise of an automobile engine while the car was halted at side of road, intention of the operators to eat their lunches while the car was halted during period of twenty minutes could be considered in determining whether they exercise due care. *Ib.*

10. *Highways. Automobiles. Frightening horse. Gross negligence.*

It was gross negligence to leave the motor of an automobile running while the vehicle was stopped just off the roadway at an elevated point, where horses being frightened might cause damage during a period of twenty minutes while the operators were eating their lunch. *Ib.*

11. *Automobiles. Frightening horse. Questions for jury. Proximate cause.*

Evidence held to present question for jury whether noise incident to unnecessary running of motor while automobile was stopped was proximate cause of injury to driver of horse frightened by such noise. *Ib.*

12. *Highways. Automobiles. Frightening horse. Questions for jury. Due care.*

Evidence held to present question for the jury whether parking automobile with engine running at narrow elevated point in highway was in the exercise of due care. *Ib.*

13. *Highways. Automobiles. Frightening horses. Liability.*

Noises incident to the proper operation of an automobile are not of themselves evidence of negligence, and, if a horse is frightened at such noises the operator would not be liable. *Ib.*

NEW TRIAL—NOTICE.

NEGLIGENCE—Continued.

14. *Highways. Automobiles. Frightening horse. Assumption of risk.*

The driver of a horse upon the public road assumes the risk of its taking fright at an automobile when operated properly and with due care. *Coca Cola Bottling Works v. Brown*, 642.

NEW TRIAL.

1. *Appeal and error. Motion for new trial. Contents and scope.*
Where the judge on first trial denied a motion for directed verdict, and the jury failed to agree, and he then denied motion for new trial on the ground of error in denying directed verdict, is was not necessary for defendant in his motion for new trial at the last trial to include the failure of the trial judge to award a new trial at the first trial. *Oliver Mfg. Co. v. Slimp*, 297.

NEXT FRIEND.

See INSANE PERSONS.

NOTICE.

1. *Vendor and purchaser. Registration of deeds.*
Registration of a deed in M. county at a time when land conveyed thereby was no longer a part of such county was wholly ineffective to give notice. *Kobbe v. Harriman Land Co.*, 251.
2. *Vendor and purchaser. Exclusion clause. Right of purchaser.*
In the absence of actual notice or notice by record or registration books or by actual adverse occupation of the land, the purchaser notwithstanding an exclusion clause in a deed in his chain of title, has the right to rest in security. *Ib.*
3. *Vendor and purchaser. Unrecorded deed. Rights of purchaser.*
An unregistered deed, though good between the immediate parties, is incomplete in law, and incapable of conveying the title as against subsequent purchaser not shown to have had actual notice. *Ib.*
8. *Vendor and purchaser. Subsequent recording. Effect.*
Recording a deed after the land has been conveyed by a registered deed to a *bona-fide* purchaser is without efficacy. *Ib.*
5. *Vendor and purchaser. Rights as against unrecorded deed.*
That defendant's predecessor in title was an attorney for G., the

NUISANCE—OFFICERS

NOTICE—Continued.

common source of title, would not prevent him from lawfully acquiring the title of a grantee having a prior registered deed, even though he had knowledge of an unrecorded deed from G. *Ib.*

See EXECUTION; VENDOR AND PURCHASER.

NUISANCE.

1. *Dams. Contractor's liability.*

That a dam erected for the United States in navigable waters created unhealthful conditions by making stagnant pools of water did not make it a nuisance, nor render the contractor liable as for maintaining a nuisance. *C. & T. R. Power Co. v. Lawson*. 354.

2. *Forcible entry and detainer. Private nuisance. Abatement.*

Where one was in actual possession of land under a deed defining its boundaries, his possession was violated when another fenced in a part of the land, and thus erected a private nuisance thereon, so that right of action accrued to him to proceed by forcible entry and detainer, or to abate the nuisance. *Walker v. Davis*, 475.

3. *Private nuisance. Abatement.*

One having a right of action for a private nuisance on his land created by another may help himself personally by abating it, if he can do so without a breach of the peace. *Ib.*

4. *Replevin. Plaintiff's right of possession. Change.*

Complainant, in exercising his fence over land in defendant's possession and leaving it there, created a private nuisance, and did not effect a lawful change of possession, so as to entitle him to replevy logs and timber cut and removed from the land by defendant on his abating the nuisance by tearing down the fence. *Ib.*

OCCUPATION TAX.

See TAXATION.

OFFICERS.

1. *Constitutional law. Removal from office. Proceedings. "Vacate." "Vacancy."*

Under ordinance providing that all officers of the city shall attend the regular meetings of the council, that any officer desiring to be temporarily absent shall apply to the mayor for

 OYER—PARENT AND CHILD.

OFFICERS—Continued.

leave, and that any officer who is absent without permission of the mayor shall thereby vacate his office, members of a board of commissioners could not, for temporary absence from the city without written authority of the mayor, be deprived of their offices without trial and opportunity to be heard, in view of constitutional guaranty of due process of law, since the word "vacate" cannot be given its technical meaning, the term "vacancy" as used in legal phraseology, meaning a place unfilled, and, when applied to an office, meaning the state of being destitute of an incumbent or a want of a proper or legally qualified officer to officiate. *Ashcroft v. Goodman*, 625.

2. *Municipal corporations. Review of proceedings of city commissioners.*

Common-law *certiorari* was the proper remedy in behalf of members of the board of city commissioners to review proceedings of board to deprive them of office. *Ib.*

3. *Municipal corporations. Certiorari. Extent of relief. "Restitution."*

On *certiorari* to review action of board of city commissioners in depriving members of such board of their offices, a writ of restitution to place such members in their respective offices was not a proper remedy, and the court of civil appeals had no authority to grant such relief, the writ of restitution being unenlarged as to scope by Thompson's Shannon's Code, section 4867, the writ of restitution at common law being a remedy whose object was to restore to the appellant that of which he had been deprived by the enforcement of the judgment against him during the pendency of the suit (citing Words and Phrases, Restitution). *Ib.*

OYER.

See PLEADING.

PARENT AND CHILD.

1. *Divorce. Custody of child. Interest of child.*

In determining the question of custody of infant children, the primary inquiry concerns their welfare rather than the technical legal right of the father to their possession and services. *Kenner v. Kenner*, 211.

2. *Divorce. Custody of children. Modification of order.*

Although in an award of the custody of child to mother in divorce proceedings the father should be accorded by court

PARTIES.

PARENT AND CHILD—Continued.

order, as matter of right, permission to see his child on proper occasions, yet this is a matter for the foreign court which granted the divorce which would, no doubt, make a suitable order on the subject upon proper request. *Ib.*

3. *Divorce. Custody of child. Jurisdiction.*

The order of a State court directing that the custody of a child, of parents divorced by foreign court, shall alternate monthly between them, is beyond the court's power, where the child's domicile is with the mother in such foreign State *Ib.*

4. *Divorce. Custody of child. Judgment as to custody.*

As between the parents, the decree of divorce of a foreign court awarding the custody of the child is *res adjudicata*, subject to modification only by the court granting the decree, with the qualification, in case of removal of the child to another State, the courts of such State may, on change of circumstances, make new disposition of child as its best interests may require. *Ib.*

5. *Divorce. Custody of child. Domicile of child.*

In awarding custody of a child in divorce proceedings, the domicile of the infant is unimportant, and will not be controlled by the legal right of a nonresident father to custody when actually in the custody of the mother; the court being solely concerned with the child's best interests *Ib.*

6. *Constitutional law. Rights of parent. Due process of law.*

A father has no property right in a child, and a claim that he was deprived of his property without due process of law and without compensation in violation of Const. U. S. Amend. 14, in that by losing its custody in divorce proceedings where he was not personally served with process he was deprived of its services, cannot be considered, although a parent is entitled to damages for value of services of a child unlawfully restrained or injured, and is also entitled to the child's earnings, but cannot compel it to do service for another. *Kenner v. Kenner*, 700.

See PARTIES.

PARTIES.

1. *Divorce. Custody of child. Proper parties. Child.*

In a proceeding by a father to procure the custody of his child from the possession of his divorced wife, the infant was not a proper party. *Kenner v. Kenner*, 211.

PARTITION.

PARTIES—Continued.

2. *Municipal corporations. Public buildings. Bonds of contractors. Right to sue.*

Where a contractor on a public building gave a bond securing performance and also payment of materialmen and laborers, and he defaulted in both respects, the city could sue on its own claim for the additional cost of completion, and also in behalf of the laborers and materialmen whose claims were unpaid. *City of Bristol v. Bostwick*, 304.

3. *Insane persons. Actions. Next friend.*

A suit may be brought in behalf of a person of unsound mind by a next friend in the name of such person, either before or after inquisition of lunacy, where no guardian or committee has been appointed. *Williams v. Gaither*, 587.

4. *Insane persons. Actions by next friend. Subsequent guardian. Control of action.*

In a suit brought by the next friend of an insane person, his subsequently appointed guardian had the right to control the suit by being substituted for the next friend, but could not appear otherwise and have the suit dismissed at the cost of the next friend. *Ib.*

3. *Insane persons. Actions. Next friend. Substitution.*

A next friend bringing a suit for an insane person is in a sense a volunteer, and the court of pendency may at any time investigate his fitness to represent the incompetent's interests, may allow or direct that some else be substituted in his place and will ordinarily substitute a subsequently appointed guardian upon application. *Ib.*

PARTITION.

1. *Remainders. Sale. Purchasers before appeal.*

No court has authority to decree partition between a life tenant and remaindermen, and such a decree is absolutely void, and a purchaser is not protected by Thompson's Shannon's Code, section 4922, providing that purchasers under a decree of the lower court, before writ of error is obtained and *supersedeas* granted shall not be disturbed. *Chickamauga Trust Co. v. Lomas*, 228.

2. *Judgment. Collateral attack.*

A decree of partition between a life tenant and remaindermen is utterly void, and can be collaterally attacked by remaindermen in a foreclosure action against land assigned by life tenant by the decree and mortgaged by him. *Ib.*

PARTNERSHIP—PLEADING.

PARTNERSHIP.

1. *Protest by partner.*

At common law, or under Public Acts 1917, chapter 140, where one of two partners notifies a bank that he will not be bound for any overdrafts made by his partner, he is not liable therefor, regardless of where the money is applied, except that he is estopped as to a check drawn by his partner in his behalf, although he had no knowledge that it was an overdraft, because in paying overdrafts over protest, the bank will be held to be doing so solely on the credit of the other partner, and no contractual relation exists between the protesting partner, or the partnership, and the bank. *Bank of Bellbuckle v. Mason*, 659.

2. *Contracts. Protest of partner. Sufficiency of notice.*

Notice by one of two partners to a bank that checks of his partner must not be paid unless there was money in the bank to the credit of the firm to meet them was sufficient to release such partner from liability for overdrafts, although he did not in terms state that he would "not be bound;" it being sufficient if he conveyed clearly and unmistakably that he dissented; that he did not consent to his partner's making overdrafts, but was opposed to it. *Ib.*

PERPETUITIES.

: *Trusts. Termination.*

A will leaving the residuary estate in trust to the firm to which a testator belonged as trustee "for my said wife and three children, share and share alike, the income derived therefrom by said trustees to be paid over to my said wife and children as their necessities demand," and providing that if it should be unnecessary to encroach upon the income, then such income was to be invested, but not providing for any devise over, created a trust which would cease as to each beneficiary at death; each devisee being entitled to receive a portion of the income from the share as his necessities might demand, and after the death of the beneficiaries the share of each would go to his or her devisee, distributee, or heir, and therefore the bequest was not void, creating a perpetuity. *Winters v. March*, 496.

PLEADING.

1. *Written instrument. "Profert." Demurrer.*

The mere profert of a note upon which an action is founded does not make it a part of the declaration, when the declara-

 PLEADING AND PRACTICE.

PLEADINGS—Continued.

tion, is tested by demurrer, "proferit" being a formula in pleading, whereby the pleader professes to bring into court an instrument to be shown to the court and his adversary. *Waterhouse v. Furniture Co.*, 117.

 2. *Writings. Proferit. Oyer.*

Where declaration contains proferit of note sued on, and oyer asked by defendant is granted, the note becomes part of the declaration. *Ib.*

 3. *Proferit and oyer. Effect.*

If an element essential to the existence of a cause of action be omitted from the declaration containing proferit, and oyer be craved, the defect will be cured if the instrument supplies or corrects the omission. *Ib.*

 4. *Demurrer. Effect.*

All averments of the petition must be taken as true on demurrer. *City of Bristol v. Bostwick*, 304.

 5. *Municipal Corporations. Public buildings. Contractor's bonds. Actions. Right to sue.*

Where the contractor gave single bond securing performance and also payment of labor and material claims and the city sued the surety for additional cost of completion after the contractor abandoned the work, also setting up the claims of materialmen and laborers, demurrers to the separate petitions of the various laborers and materialmen should have been sustained, since the bill was not one of interpleader nor a general creditor's suit. *Ib.*

 6. *Taxation Collection. Sufficiency of bill.*

A bill to enforce a transfer tax upon realty imposed by Revenue Act 1915, section 8, which alleged that the property was mortgaged for a certain sum and was worth considerably more, held not sufficient because not stating the property's true value. *State ex rel. v. L. & N. R. Co.*, 406.

PLEADING AND PRACTICE.

 1. *Insane persons. Actions. Costs.*

A guardian appointed subsequent to a suit by her insane ward by his next friend should not be allowed to dismiss the suit without payment of costs. *Williams v. Gaitther*, 587.

 2. *Death. Self-defense. Law governing.*

The law of self-defense in a civil suit is the same as that governing in criminal prosecutions, except that the cause

PLEDGES—PRINCIPAL AND SURETY.

PLEADING AND PRACTICE—Continued.

must be decided on a preponderance of testimony, whereas in criminal prosecutions defendant is entitled to the benefit of a reasonable doubt. *Hunt-Berlin Coal Co., v. Paton*, 611.

3. *Certiorari. Informal and technical errors.*

Writs of *certiorari* and *supersedeas* to review, reverse, and stay execution of decree of court of civil appeals ruling that members of city council had been wrongfully deprived of office and directing issuance of writs of restitution will not be granted, although writ of restitution was without authority; practical justice having been attained, and the issuance of writ of *certiorari* to which the *supersedeas* applied for is dependent, being within judicial discretion of the court, to be granted only when necessary to prevent substantial wrong, especially where the matters in controversy are of a public nature. *Ashcroft v. Goodman*, 625.

See TRIAL.

PLEDGES.

1. *Foreclosure of collateral. Attorney's fees.*

Where a promissory note, secured by certain mortgage bonds as collateral, provided that after the proceeds of any sale had been applied to the payment of or a credit upon this note, and after deducting costs and attorney's fees, should any deficiency remain the maker agrees to pay the same, the provision is for the indemnity of the pledgee against loss, and to enable it to recover the whole debt without being charged with attorney's fees, and if the pledge should be put to the necessity of overcoming legal obstructions in selling the collateral, attorney's fees may be deducted from the proceeds of the sale. *Carolina Spruce Co. v. Black Mountain R. Co.*, 248.

PRESUMPTIONS.

See BILLS AND NOTES; EVIDENCE; GIFT; INFANTS.

PRINCIPAL AND SURETY.

Mechanics liens. Indemnity against lien. Bond of contractor. Liability of surety.

A bond conditioned that surety shall indemnify the owner for "loss resulting from the enforcement of mechanics' liens" does not render the surety liable for attorney's fees and costs from

PROCESS—PUBLIC LANDS.

PRINCIPAL AND SURETY—Continued.

attempted enforcement of liens which failed because proper notice of claim was not given. *Bird Bros. v. Southern Surety Co.*, 11.

PROCESS.

See ATTACHMENT; CORPORATIONS; DIVORCE; JUVENILE COURTS.

PROFERT.

See PLEADING.

PUBLIC LANDS.

1. *Boundaries. Compact. Grants.*

A joint boundary commission, appointed in 1779 to extend the boundary line of Virginia and North Carolina, running upon thirty-six degrees thirty minutes north latitude, ran a line, supposed to be due west, into Carter's Valley, and the Virginia Commission ran a line, known as Walker's line, from thence to the Tennessee river, leaving an unsurveyed gap from Deep or Clear fork to the first crossing of Cumberland river, which line deflected and reached the river on thirty-six degrees forty minutes north latitude. A compromise agreement was made in 1820, and thereafter ratified, adopting the Walker line from Cumberland gap to the Tennessee river and the line of thirty-six degrees thirty minutes north latitude from thence to the Mississippi, whereby Kentucky yielded the land between Walker's line and thirty-six degrees thirty minutes east of the Tennessee river, to Tennessee, which agreed that all vacant land should be the property of the subject to the disposition of Kentucky. Claimants in ejectment claimed under a grant from Tennessee in 1849, and defendants claimed under a grant from Kentucky in 1880, the land lying between the Walker line and a line on thirty-six degrees thirty minutes north latitude. *Held*, that under the compact the Kentucky grant was valid, though the land was in Tennessee, and that Kentucky could not have abandoned such right by mere implication or by any conduct short of a clear and unmistakeable affirmative act indicating a purpose to repudiate ownership. *Russell v. American Association*, 124.

2. *Estoppel. After-acquired title.*

Since a State in granting lands conveys without covenant, the doctrine of estoppel does not apply to a grant from the State so as to pass an after-acquired title, and such grant passes only the title the State then had. *Id.*

RAILROADS.

RAILROADS.

1. *Signals. Sufficiency of evidence.*

The statement of a witness that the whistle was not sounded "until it blew inside the corporation here" and of another that he lives one and one-half miles from Rogersville and one mile from the spring, not giving relative location of each and of depot, does not locate city limits or establish defendant's failure to comply with Thompson's Shannon's Code, section 1574, subsection 3, as to giving signals before reaching and while passing through incorporated cities. *Alexander v. V. & S. W. Ry. Co.*, 52.

2. *Killing dog. Contributory negligence. Statute. "Highway."*

Under Thompson's Shannon's Code, section 2853a, providing that it shall be unlawful for any person to allow a dog belonging to him to go upon a highway, etc., the owner of a female dog who allowed her to go upon the track of a railroad where she was killed was guilty of contributory negligence, and could not recover her value; the railroad being a "highway." *C., N. O. & T. P. R. Co. v. Ford*, 291.

3. *Killing dog on track. Liability. Statute.*

Thompson's Shannon's Code, sections 1574-1576, requiring railroads to keep the engineer, fireman, or other person on their locomotives always on the lookout ahead and, when any animal appears on the tracks, to sound the alarm whistle, put down the brakes, and employ every possible means to stop the train and prevent an accident, were not intended to be applied for the protection of an unregistered female dog running at large, declared a public nuisance by section 2853a2. *Ib.*

4. *Separate accommodations for races. Statutes. Construction.*

The statute of Arkansas (Kirby's Dig., sections 6622-6625), requiring separate accommodations in certain cars for the use of white and African passengers, does not require a dining car to be partitioned with wood, nor that two separate dining cars be provided. *Shelton v. C., R. I. & P. R. Co.*, 378.

5. *Separate accommodations for races. Statutes. Construction.*

Under the Arkansas Statutes (Kirby's Dig., sections 6622-6625), as to separate accommodations for white and African passengers, it is sufficient if a railroad operating dining cars serves white persons at one time and the negroes at another without providing separate coaches. *Ib.*

6. *Separate accommodations for races. Statutes. Construction. Liability.*

A railroad which maintained a dining car, intending to serve white and negro passengers at different hours, was liable to a

 RECEIVERS.

RAILROADS—Continued.

white passenger, when it permitted negroes to be served while she was in the car, only for its negligence in making a call to the dining car for white persons at the time when negroes were about to be served *Shelton v. C., R. I. & P. R. Co.*, 378.

7. *Excessive damages.*

Where a railroad permitted negroes to be served while white passengers were in the dining car, on perceiving which plaintiff arose and left the car and the steward insisted in the hearing of others that she pay for the meal ordered, a verdict of \$750 was excessive and should be reduced to \$250. *Ib.*

8. *Taxation. Privilege tax.*

Under Code 1858, section 51, defining land, a railroad acquiring the property of another corporation is liable for the tax imposed by Revenue Act 1915, section 8, on all transfers of realty, although railroad property is merely incident to its use as a highway. *State ex rel. v. L. & N. R. Co.*, 406.

9. *Taxation. Transfer tax. Collection.*

Where a railroad pays the transfer real estate tax imposed by Revenue Act 1915, section 8, upon property extending through several counties, the tax need be paid only to the clerk of the county court of the county in which the deed to the land involved is first registered. *Ib.*

10. *Injuries to animals. Nature of action.*

Since the statutes do not cover injuries to animals by railroads other than by collision, an action for injuries to mules frightened by a train and injured in a trestle is a common-law action. *N., O. & St. L. Ry. Co. v. Ford*, 505.

11. *Animals on tracks. Duties of engineer.*

After those in charge of the train observe frightened animals on the track or near by, it is incumbent on them to use ordinary care in operating the train, and if they approach negligently and further frighten the animals and cause injury, the railroad is liable. *Ib.*

12. *Animals on tracks. Negligence. Evidence.*

Evidence held insufficient to show negligence in operation of a train by which mules on the track were frightened and caused to be injured on a trestle. *Ib.*

 RECEIVERS.

Banks and banking. Compromise with debtors. Discretion of chancellor. Scope of inquiry.

In a proceeding to wind up affairs of bank, where receiver petitioned for leave to compromise claims against stockholders and

REGISTRATION OF DEEDS—REPLEVIN.

RECEIVERS—Continued.

directors, the inquiry was not limited to whether there were sustainable causes of action against such persons, but the question was whether it was practicable and advantageous to compromise. *Knaffl v. Knoxville Banking & Trust Co.*, 240.

REGISTRATION OF DEEDS.

See NOTICE.

REPLEVIN.

1. *Right to remedy. Note. Possession.*

Where defendant's agent sold a third person a farm, taking notes, and the agent forged defendant's signature as indorser, pledging the notes as collateral to the bank, and then made new forged notes, exact duplicates of the true notes, which defendant indorsed believing that he had indorsed the genuine notes, the indorsee could not have replevin to recover the true notes; the delivery of the false notes not having been a valid transference vesting legal title in the indorsee in view of Negotiable Instruments Act (Laws 1899, chapter 94) section 16, making a contract concerning a negotiable instrument incomplete until delivery. *Horn v. Nicholas*, 453.

2. *Right to writ. Note. Possession.*

Assuming that the indorsee of a false note which both parties thought was the valid note was an equitable assignee, he could not maintain replevin to recover the true note, since one to maintain replevin must show a legal right of possession or ownership as distinguished from such a right recognized in courts of equity. *Id.*

3. *Right to writ. Note. Possession. "Delivery."*

Where defendant's agent sold a third person a farm, taking notes, and the agent forged defendant's signature as indorser, pledging the notes as collateral to the bank, and then made new forged notes, exact duplicates of the true notes, which defendant indorsed believing that he had indorsed the genuine notes, the indorsee could not have replevin to recover the true notes on the theory of constructive delivery, since "delivery" means transfer of possession from one person to another, and there could be no transfer of possession where the transferor had no possession. *Id.*

4. *Plaintiff's right of possession. Change.*

Complainant, in extending his fence over land in defendant's possession and leaving it there, created a private nuisance, and did

 RES ADJUDICATA—SALES.

REPLEVIN—Continued.

not effect a lawful change of possession, so as to entitle him to replevy logs and timber cut and removed from the land by defendant on his abating the nuisance by tearing down the fence. *Walker v. Davis*, 475.

 5. *Right of possession. Title.*

Where one claiming a tract of land to limits of the boundary shows an actual possession under a deed defining boundaries, when another invades it, fells timber, and cuts it into logs, he may replevin the logs left on the ground, and it is unnecessary for him to show title, and a similar showing is also sufficient to defeat replevin against him by the invader for logs cut from the land. *Ib.*

 6. *Sales. Conditional sales. Personal judgment.*

The taking of a personal judgment against a purchaser under a conditional sales contract upon default does not preclude resort to replevin to bring the property to sale under Thompson-Shannon Code, section 3666; the retention of title being security for the personal obligation, which security is not lost by the judgment. *Johnson v. Furniture Co.*, 580.

RES ADJUDICATA.

Certiorari. Review. Law of case.

A former determination by the supreme court in the same proceedings that petitioner who was removed from the office of chief of police was a civil service employee entitled under the charter of the municipality to have charges formulated and preferred against him, and to a trial before removal, is conclusive in subsequent proceedings as the law of the case. *City of Knoxville v. Connors*, 45.

See DIVORCE; JUVENILE COURTS.

SALES.

 1. *Conditional sales. Default. Advertisement. Waiver.*

While a seller and purchaser in a conditional sale can waive advertisement and sale on default, as provided in Acts 1889, chapter 81, yet advertisement cannot be waived unless the sale is also waived, because the purpose of allowing the waiver is to permit a final settlement of the account by agreement. *Ward v. Sharpe*, 347.

 2. *Contracts. Validity. Mutuality. Certainty.*

A letter from a corporation to another, stating, "You may enter our contract for a minimum quantity of one hundred twenty

SELF-DEFENCE—STARE DECISIS.

SALES—Continued.

tons, maximum quantity of one hundred forty-five tons" of paper specifying the prices and terms signed by the corporation and accepted by the other, is not void for uncertainty or lack of mutuality. *Southern Pub. Ass'n. v. Clements Paper Co.*, 429.

3. *Contracts. Construction. Rights of parties.*

Under contract for paper specifying a minimum and maximum quantity if the option was with the seller, it was bound to deliver the minimum, and might deliver any additional quantity up to the maximum; but if it lay with the purchaser, the purchaser was bound to accept the minimum, and could require the maximum. *Id.*

4. *Conditional sales. Personal judgment. Replevin.*

The taking of a personal judgment against a purchaser under a conditional sales contract upon default does not preclude resort to replevin to bring the property to sale under Thompson's-Shannon's Code, section 3666; the retention of title being security for the personal obligation, which security is not lost by the judgment. *Johnson v. Furniture Co.*, 580.

See FIXTURES.

SELF-DEFENSE.

See DEATH.

SHAVING NOTES.

See LICENSES.

SHERIFF'S SALES.

See EXECUTION.

SPECIFIC PERFORMANCE.

Contracts for sale of land.

Although grantor has good title by reason of adverse possession, a contract of sale of such land cannot be specifically enforced unless good title is shown of record, because a purchaser does not have to take a title which will have to be proved by parol evidence. *Cross v. Buskirk-Rutledge Lumber Co.*, 79.

STARE DECISIS.

Courts. Rule of stare decisis. Unreported opinion.

An unreported opinion, affirming an erroneous decision of the chancellor without opinion, will not be followed under the rule of stare decisis. *Kobbe v. Harriman Land Co.*, 251.

STATES—STATUTORY CONSTRUCTION.

STATES.

Agreement or compact with another State. Constitutional provisions. Implied assent.

Under Constitution U. S. article 1, section 10, clause 3, providing that no State shall, without the consent of Congress, enter into any agreement or compact with another State, the formal consent of Congress to a compact between Tennessee and Kentucky looking to the establishment of their boundary line was not necessary, as such consent might be implied. *Russell v. American Association*, 124.

STATUTES.

See TAXATION.

STATUTE OF FRAUDS.

1. *Sufficiency of writing. Signed letters.*

Where defendant, by letter, offered complainant employment for two years at a fixed compensation, and complainant wrote letters indicating an acceptance, there was a sufficient compliance with the statute of frauds (Thompson's Shannon's Code, section 3142, subsec. 4), even though it be deemed that the written memorandum should be signed by both parties; both defendant and complainant having signed their respective letters. *Brewer v. De Camp Glass Casket Co.*, 97.

2. *Promise to pay debt of another. Original promise.*

Where the promise of a garnishee to pay plaintiff in garnishment a stated sum to be applied on the judgment if he would continue the case to an agreed date was direct and clear as between the parties, the Statute of Frauds as to answering for the debtor of another did not apply. *Townsend v. Neuhardt*, 695.

STATUTES AND STATUTORY CONSTRUCTION.

1. *Construction.*

Courts have no right to give to statutes a meaning not deducible from the unambiguous language used. *State ex rel. v. Howard*, 73.

2. *Repeal. Constitutionality.*

Priv. Acts 1911, chapter 269, providing for lawful fences in Hamilton county, is not unconstitutional as being in violation of Constitution, article 2, section 17, requiring an act repealing a former act to recite the title or substance of the former act, such act, though not referring sufficiently to the title, in fact making ade-

STREET RAILROADS.

STATUTES AND STATUTORY CONSTRUCTION—Continued.

quate reference to the substance. *Chattanooga Ry. & Light Co. v. Bettis*, 332.

3. *Animals. Stock laws.*

Priv. Acts 1911, chapter 269, providing for lawful fences in Hamilton county, does not repeal by implication Acts 1899, chapter 23, making it unlawful to permit stock to run at large in Hamilton county; the act of 1911 only applying to rural districts in such county, and therefore not covering the same field. *Ib.*

4. *Action. Operation. Violation.*

One not the beneficiary of a statute may neither base an action nor defense on a violation thereof. *Ib.*

5. *Construction.*

A statute, when possible, should be given a construction making it sensible, without manifest inconvenience, so serious as to work injustice. *Shelton v. C., R. I. & P. R. Co.*, 378.

6. *Taxation. Construction.*

Tax statutes will be construed most strongly against the State. *State ex rel. v. L. & N. R. Co.*, 406.

7. *Construction. Part materia.*

Statutes in *part materia* will be construed together, and the whole statute considered in determining its true meaning. *Ib.*

8. *Taxation Statutes. Double taxation.*

Statutes creating privileges will be construed so as not to impose double taxation, unless such construction is expressly or impliedly required. *Ib.*

9. *Subjects and title. Crimes.*

Acts 1915, chapter 125, entitled "An act to require husbands to provide for their wives, . . . " and providing that it is a misdemeanor (a) for any husband to willfully and without good cause neglect or fail to provide for his wife according to his means, and (b) for any husband willfully and without good cause to leave his wife destitute or in danger of becoming a public charge" does not violate Constitution article 2, section 17, providing that no bill shall embrace more than one subject, that subject to be expressed in the title. *Moye v. The State*, 680.

See EXEMPTIONS.

STREET RAILROADS.

Injuries to animals. Contributory negligence.

Defendant railroad company was sued for negligently killing plaintiff's pig, and interposed a defense of contributory negligence,

SUPREME COURT—TAXATION.

STREET RAILROADS—Continued.

based upon plaintiff's violation of Acts 1899, chapter 23, making it unlawful to permit stock to run at large. *Held*, that such act, not being passed for the protection of defendant railroad company, it could not predicate a defense of contributory negligence thereon. *Chattanooga Ry. & Light Co. v. Bettis*, 332.

SUPREME COURT.

See COURTS.

TAXATION.

1. *Bills and notes. Actions. Defenses.*

Acts 1907, chapter 602, section 1, declares that all property, real, personal, and mixed, shall be assessed for taxation. Section 8 provides that all personal property of every kind shall be assessed, while subsection 7 specifies for assessment all notes, duebills, choses in action, accounts, mortgages, or any other evidence of indebtedness. Section 12 requires taxpayers to fill out or cause to be filled out a schedule setting out their property not later than April 20th of each year, while section 14 provides that in any suit upon any note, bill, bond, or other chose in action subject to taxation, it shall be competent for any defendant to allege and show in defense that such note, bill, bond, or other chose in action was not given in, or included in, the owner's assessment for taxation for the preceding year, and upon such defense being established, the owner or holder of such note, etc., shall be taxed with all the court costs of the case, and the court shall declare, in rendering such judgment, a lien in favor of the state for taxes unpaid. *Held*, that in an action on notes not listed for taxation, recovery cannot be denied for that reason, and proof of nonlisting will merely authorize the court to impose payment of costs on plaintiff and the declaration of a lien on the recovery. *Poss v. Albert*, 1.

2. *Listing for taxation. Lien.*

Plaintiff demised premises for a term of years ending August 1, 1914. The lessees executed a series of rent notes, one note for each month's rent, and defaulted in payment of rent accruing after November, 1913. After the expiration of the term, plaintiff sued one of the lessees on the notes. None of the notes involved were listed by plaintiff in his schedule for taxes for the year expiring January 10th. *Held* that, though the owner of personalty has until April 20th to fill out a schedule, the taxes are assessed as of January 10th, and hence a lien for taxes can be declared only on these notes due on January 10th, and as to

TAXATION.

TAXATION—Continued.

the other notes involved, no lien could be declared, nor could the costs of the proceedings, as to them, be assessed against plaintiff, for until such notes became due, they were part of the real property. *Id.*

3. *Property taxable. Realty. Rent notes. Nature of.*

Notes executed for rent to accrue are part of the real estate as long as held by the owner and until they mature, and as they would in event of the owner's death pass with the reversion and not as personal property, they need not be listed for taxation as personal property until maturity. *Id.*

4. *Licenses. Nature of "license." Occupation tax.*

A "license," in its truer sense is issued under the police power, not for revenue, but for regulation, while a license may be issued on payment of an "occupation tax" levied under Constitution article 2, section 28, conferring power to tax privileges, revenue being its primary object, though regulation may be incidental; power exercised in the first case being to license and in the other to tax and license. *McMillan v. City of Knoxville*, 319.

5. *Licenses. Nature of "occupation tax."*

An "occupation tax" is levied primarily for revenue, and in instances for regulation incidentally. *Id.*

6. *Licenses. Employment agencies. Statutes. Repeal.*

It was competent for the legislature to provide a regulatory license for and also an occupation tax on employment agencies, the two not being inconsistent or impinging on each other; and hence Pub. Acts 1917, chapter 78, providing for the regulation and supervision of "employment agencies," and requiring one engaging in such business to pay a fee and obtain a license, did not repeal Pub. Acts 1917, chapter 70, taxing the business of emigrant agents. *Id.*

7. *Constitutional law. Licenses. Occupations. Amendment.*

It was competent for the legislature to add to whatever regulation was created in the imposition of a privilege or occupation tax on employment agencies under Pub. Acts 1915, chapter 101, and Pub. Acts 1917, chapter 70, by providing for more detailed policing regulation thereof in Pub. Acts 1917, chapter 78. *Id.*

8. *Licenses. Nature of fee. Distinction from occupation tax.*

A true license fee, as contradistinguished from an occupation tax, should be fixed to cover the expense of issuing it, the services of officers and other expenses directly or indirectly incident to supervising the particular business of occupation. *Id.*

TAXATION.

TAXATION—Continued.

9. *Licenses. Occupation tax. Employment agencies.*

A license issued to an employment agent on payment of an occupation tax under Pub. Acts. 1915, chapter 101, levied primarily for revenue, did not preclude the State and a city from denying him the privilege of continuing the emigrant feature of his business thereunder until its expiration without payment of the tax on emigrant agents imposed by Pub. Acts 1917, chapter 70, and a city ordinance. *McMillan v. City of Knoxville*, 319.

10. *Constitutional law. Licenses. Statutes. Modification or repeal.*

A licensee is bound to know that his license or permit, issued on payment of a tax primarily for revenue, is held subject to modification or repeal of the law under which it was issued, from the making of which change if the public welfare required it, no incidental inconvenience to him would stay the law. *Ib.*

11. *Commerce. Interstate commerce. Restriction by license tax.*

The tax imposed by Pub. Acts 1917, chapter 70, on the business of emigrant agents, is not a restriction on interstate commerce. *Ib.*

12. *Licenses. Privilege tax. Oil tanks.*

Revenue Law (Laws 1915, chapter 101), imposing a tax on persons having oil tanks, etc., for the purpose of selling, delivering, or distributing oil, is inapplicable to a petroleum manufacturer and refiner maintaining storage tanks merely as a part of its manufacturing establishment and making only a manufacturer's profit. *General Refining & Producing Co. v. Davidson County*, 401.

13. *Statutes. Construction.*

Tax statutes will be construed most strongly against the State. *State ex rel. v. L. & N. R. Co.*, 406.

14. *"Privilege Taxes." What constitutes.*

Revenue Act 1915 (Laws 1915, chapter 101) sections 8 and 10, taxing transfers of realty and corporations acquiring the property of another corporation, impose privilege taxes. *Ib.*

15. *Statutes. Double taxation.*

Statutes creating privileges will be construed so as not to impose double taxation, unless such construction is expressly or impliedly required. *Ib.*

16. *Privilege taxes. Railroads.*

A railroad which paid a tax imposed by Revenue Act 1915, section 10, on corporations acquiring the property of another corporation, is also liable for the tax imposed by section 8 upon all transfers of realty, since such sections impose different taxes and double taxation does not result. *Ib.*

TAXATION.

TAXATION—Continued.

17. *Privilege tax. Railroads.*

Under Code 1858, section 51, defining land, a railroad acquiring the property of another corporation is liable for the tax imposed by Revenue Act 1915, section 8, on all transfers of realty, although railroad property is merely incident to its use as a highway. *Ib.*

18. *Collection. Sufficiency of bill.*

A bill to enforce a transfer tax upon realty imposed by Revenue Act 1915, section 8, which alleged that the property was mortgaged for a certain sum and was worth considerably more, held not insufficient because not stating the property's true value. *Ib.*

19. *Collection. Prima-facie evidence.*

In a suit to collect a real estate transfer tax imposed by Revenue Act 1915, section 8, the value of the property stated in the deed is only *prima-facie* evidence of its true value. *Ib.*

20. *Transfer tax. Collection.*

Where a railroad pays the transfer real estate tax imposed by Revenue Act 1915, section 8, upon property extending through several counties, the tax need be paid only to the clerk of the county court of the county in which the deed to the land involved is first registered. *Ib.*

21. *Commerce. Interstate commerce. Privilege taxes. Sale of alcoholic beverages.*

Acts 1917, chapter 70, imposing a privilege tax on wholesale dealers in foreign-made nonintoxicating beverages containing alcohol, and no domestic manufacturers of such drinks, is unconstitutional within Const. U. S. article 1, section 8, sub-section 3, as imposing a burden on interstate commerce. *Diehl & Lord v. Hailey*, 466.

22. *Commerce. Interstate commerce. Taxes.*

Mere fact that tax was imposed on manufacture in the State of nonintoxicating alcoholic beverages larger than that imposed on wholesalers of such drinks made outside the State does not justify the classification in Acts 1917, chapter 70, and the omission therein to tax wholesalers of the domestic product. *Ib.*

23. *Commerce. Interstate commerce. Taxes.*

Conceding that only foreign-made nonintoxicating alcoholic beverages were ever in the State, Acts 1917, chapter 70, imposing tax only on wholesalers of such foreign-made beverages, is invalid as an imposition on interstate commerce. *Ib.*

 TENANT—RIGHT OF RENEWAL—TRIAL.

TAXATION—Continued.

24. *Municipal corporations. Bond issues. Validity.*

'Under Constitution 1870, article 2, section 29, providing that the legislature may authorize municipalities to tax for county and corporate purposes in such manner as shall be prescribed by law, but that a municipality's credit shall not be pledged in aid of any person, etc., unless such action be authorized at an election, no election is necessary where the municipality directly taxes for a direct public purpose unless the statute specifically so requires. *Berry v. Shelby County*, 532.

See CONSTITUTIONAL LAW.

TENANT—RIGHT OF RENEWAL.

See LANDLORD AND TENANT.

TRESPASS.

Interpleader. Who may maintain.

Where an admitted trespasser had mined coal on land claimed by two other parties and both sued, the trespasser could not maintain a bill of interpleader, or a bill in the nature of a bill of interpleader, to determine to whom it was indebted. *Fuel & Iron Co. v. Leonard*, 648.

, TRIAL.

1. *Refusing directed verdict. Waiver of errors.*

Error, if any, in overruling motion for directed verdict is not waived by failure to except to a subsequent order restoring the case to the docket for retrial. *Oliver Mfg. Co. v. Slimp*, 297.

2. *Municipal corporations. Public buildings. Contractor's bonds. Actions. Right to sue.*

Where contractor gave single bond securing performance and also payment of labor and material claims and the city sued the surety for the additional cost of completion after the contractor abandoned the work, also setting up the claims of materialmen and laborers, demurrers to the separate petitions of the various laborers and materialmen should have been sustained, since the bill was not one of interpleader nor a general creditor's suit. *City of Bristol v. Bostwick*, 304.

3. *Municipal corporations. Public buildings. Actions. Questions for jury.*

Where the city sued on a contractor's bond for his failure to complete the building, it was for the jury whether the city

TRIAL.

TRIAL—Continued.

could recover liquidated damages for failure to complete the building. *Ib.*

4. *Homicide. Dying declarations. Admissibility. Question for court.*

The admissibility of dying declarations is a question for the court. *Dickason v. State*. 602.

5. *Homicide. Dying declarations. Admissibility. Question of fact.*

The competency of a dying declaration is ordinarily a mixed question of law and fact. *Ib.*

6. *Homicide. Instructions on dying declaration. Reversible error.*

In a prosecution for murder, instruction that dying declaration introduced in evidence was to be considered as the evidence of a witness, held reversible error, for a dying declaration is not put on the same plane as testimony of a witness appearing before the jury. *Ib.*

7. *Criminal law. Exception to dying declaration. Review.*

Where exception below challenged entire dying declaration, most of which was competent, assignment of error as to part of declaration will be overruled on appeal, since incompetent portions should have been specifically pointed out. *Ib.*

8. *Master and servant. Injury to third person. Scope of employee's duty.*

It was outside the scope of the duty of a yardmaster of a coal company in admitting an employee of a light company to inspect a meter to engage in a dispute with him relative to the demerits of their respective employers in course of which he was provoked into killing the inspector, and, on these facts appearing in action for his death, the coal company was entitled to a peremptory instruction. *Hunt-Berlin Coal Co. v. Paton*, 611.

9. *Death. Self-defense. Question for jury.*

In an action for wrongful death, evidence as to self-defense, held to present a question for the jury. *Ib.*

10. *Criminal law. Testimony by accused. Rebuttal.*

One accused of assault with intent to murder having testified in his own behalf, and the State having produced testimony that he offered to pay \$500 if the prosecution were dismissed,

TRUSTS.

TRIAL—Continued.

should have been allowed in rebuttal to contradict such testimony. *Arnold v. The State*, 674.

See APPEAL AND ERROR.

TRUSTS.

1. *Constructive trusts. Establishment.*

Where the seller, who assigned the lease of the demised premises in which the business was conducted before expiration of that lease, obtained from the landlord a lease running to him which was to commence at its expiration, the seller was guilty of such bad faith that equity will require him to hold the lease as a constructive trustee for the benefit of the purchaser who was the assignee of the first lease. *Fine v. Lawless*, 160.

2. *Constructive trusts. Defenses.*

In such case, refusal of the landlord to renew the lease to or for the benefit of the purchaser of the business, to whom the first lease was signed, does not entitle the seller to take a renewal for himself or defeat the constructive trust, for a rule to that effect would open the door to collusion. *Ib.*

3. *Constructive trust. Leases. Assignment.*

Though both the lease assigned to the purchaser and the one obtained by the seller declared that it should not be assigned or transferred by the lessee or by operation of law without written consent of the owner does not prevent the purchaser from insisting on the establishment of such constructive trust, he cannot by that means force the owner to accept him as a tenant and allow him to occupy the premises. *Ib.*

4. *Duration.*

The duration of a trust depends upon the purposes thereof; and when such purposes have been accomplished, the trust ceases. *Winters v. March*, 496.

5. *Perpetuities. Termination.*

A will leaving the residuary estate in trust to the firm to which a testator belonged as trustee "for my said wife and three children, share and share alike, the income derived therefrom by said trustees to be paid over to my said wife and children as their necessities demand," and providing that if it should be unnecessary to encroach upon the income, then such income was to be invested, but not providing for any

TURNPIKES—VENDOR AND PURCHASER.

TRUSTS—Continued.

devise over, created a trust which would cease as to each beneficiary at death; each devisee being entitled to receive a portion of the income from his share as his necessities might demand, and after the death of the beneficiaries the share of each would go to his or her devisee, distributee, or heir, and therefore the bequest was not void, creating a perpetuity. *Id.*

6. *Merger of estates.*

Where a bill devised a testator's residuary estate to trustees for the benefit of his widow and children, the bequest did not merge the estate with the remainder, where the trust was active, and merger would have defeated testator's intention. *Id.*

TURNPIKES AND TOLL ROADS.

Action for injury. Evidence. Negligence. Proximate cause.

In an action against a turnpike company for injury to a traveler passing over a bridge, evidence held to sustain a finding of negligence in failing to fence one side of an approach thereto, and that this contributed as a proximate cause to the injury. *Columbia & Big Bigby Turnpike Co. v. English*, 634.

UNITED STATES.

Dams. Appropriation of lands. Torts.

Where a dam was erected for the United States in navigable stream and alternate overflow and recession caused by stagnant pool on land of a private owner, the United States was not liable for failure to drain the pool, since it had no right to go upon private lands for such purpose *O. & T. R. Power Co. v. Lawson*, 355.

See LIABILITY.

UNLAWFUL DETAINER.

See LANDLORD AND TENANT.

VENDOR AND PURCHASER.

1. *Contract for warranty deed. When contract becomes executed. Remedies of vendee.*

Where title is defective, delivery of a warranty deed to one who has gone into possession on representation of good title under contract of bargain and sale, but providing for "apt and

VENDOR AND PURCHASER

VENDOR AND PURCHASER—Continued.

proper deed with covenants of general warranty," does not render the contract an executed one, so as to prevent a rescission of the contract, the absence of waiver. *Cross v. Buskirk Rutledge Lumber Co.*, 79.

2. *Contract for warranty deed. When executed.*

Under contract for warranty deed, delivery of warranty deed, where title of grantor depends on parol evidence of adverse possession, is not sufficient to render contract executed, in absence of waiver, because title must be good as founded on the records, and not on fact not of record. *Ib.*

3. *Notice. Registration of deeds.*

Registration of a deed in M. county at a time when land conveyed thereby was no longer a part of such county was wholly ineffective to give notice. *Kobbe v. Harriman Land Co.*, 251.

4. *Prior deeds. Duty to make inquiry.*

Under Thompson's Shannon's Code, section 3749-3750, providing that instruments required to be registered give notice to third persons not having actual notice only from the noting thereof for registration on register's books; section 3751, providing that in case of rival instruments, the instruments first registered or noted for registration shall have preference over one of earlier date not noted for registration, and section 3752, providing that any of said instruments not so proved or acknowledged and registered or noted for registration shall be null and void as to existing and subsequent creditors of or *bona-fide* purchases from the makers without notice, purchaser claiming under deed containing clause excluding older and better titles would not be operated with the duty of making inquiry or investigation for prior conveyances outside of and beyond the registration books provided by law, in the absence of actual notice, being purchasers the same as purchasers under deeds not containing such clauses and their instruments, deeds just the same. *Ib.*

5. *Duty of purchaser to make inquiry. Unrecorded deeds.*

It is the duty of one who purchases directly under a deed containing a clause, excluding older and better titles, to explore the land for adverse possessions, and to search the public records for prior instruments affecting the title. *Ib.*

VENDOR AND PURCHASER.

VENDOR AND PURCHASER—Continued.

6. *Knowledge of prior conveyances. Presumption.*

A purchaser under a deed containing an exclusion clause is conclusively presumed to know whatever could have been discovered from the public records or from an investigation for adverse possessions. *Id.*

7. *Actual notice of unrecorded deed. Burden of proof.*

The burden of showing that a purchaser under a deed containing an exclusion clause had actual notice of a prior unrecorded deed was on the party asserting such fact. *Id.*

8. *Exclusion clause. Right of purchaser.*

In the absence of actual notice or notice by record or registration books or by actual adverse occupation of the land, the purchaser, notwithstanding an exclusion clause in a deed in his chain of title, has the right to rest in security. *Id.*

9. *Unrecorded deed. Rights of purchaser.*

An unregistered deed, though good between the immediate parties, is incomplete in law, and incapable of conveying the title as against subsequent purchasers not shown to have had actual notice. *Id.*

10. *Notice. Subsequent recording. Effect.*

Recording a deed after the land has been conveyed by a registered deed to a *bona-fide* purchaser is without efficacy. *Id.*

11. *Notice. Records of old county. Duty to search.*

An immediate purchaser from one having deed containing clause excluding older and better titles would not be bound to search records of M. county after the land embraced by the deed had been transferred by the legislature to a new county. *Id.*

12. *Rights as against inferior title.*

As in a proceeding in which the land in question was attached and sold as the property of K. only such title as was possessed by him could be passed by decree, notice from recording of such decree would be ineffectual as to parties claiming under a deed superior to K.'s. *Id.*

13. *Rights as against unrecorded deed.*

That defendant's predecessor in title was an attorney for G., the common source of title, would not prevent him from lawfully acquiring the title of a grantee having a prior registered deed, even though he had knowledge of an unrecorded deed from G. *Id.*

 WILLS—WORDS AND PHRASES.

VENDOR AND PURCHASER—Continued.

14. *Priority of deeds. Lis Pendens.*

In all cases subject to the registration laws, the deed first registered has priority over constructive notice of *lis pendens*. *Hammock v. Qualls*, 388.

15. *Rights of purchaser. Reasonable diligence.*

Ordinary negligence in procuring a sheriff's deed, unexplained, should defeat the title of the execution purchaser as against one who buys in good faith and without notice of the title claimed by the execution purchaser. *Ib.*

16. *Execution. Rights of purchaser. Reasonable diligence.*

No positive rule can be stated as to what constitutes such delay of an execution sale purchaser in getting a sheriff's deed as will destroy the right to *lis pendens*, but one relying upon the rule must understand that his claim is *strictissimi juris*. *Ib.*

17. *Execution. Rights of purchaser. Reasonable diligence.*

Where the purchaser at a sale under condemnation by the circuit court after levy of a justice's judgment delayed getting a sheriff's deed for over eight years, his delay was a gross negligence, amounting to an abandonment of his lien, and a subsequent purchaser without notice, who recorded his deed, had superior title, though the purchaser finally took a deed; such deed not relating back to the levy. *Ib.*

WILLS.

1. *Construction.*

A gift by testator of the use of all his property, real and personal, to his wife for her life, created a life estate in all property, real and personal. *Cross v. Buskirk-Rutledge Lumber Co.*, 79.

2. *Construction. Contradiction.*

Where a testator gave wife a life estate in all his property, a power of sale given to executors cannot be construed to deprive her of her life estate, or dispose of property without her joining in the deed. *Ib.*

WORDS AND PHRASES.

1. *"Employment agency."*

An "employment agency" may be defined to be one for the brokerage of labor for a fee paid by the applicant for employment or by the prospective employer, and any definition thereof would include the employment of laborers to

WORDS AND PHRASES.

WORDS AND PHRASES—Continued.

work for another either in or beyond the State, and it does not imply placing of laborers and domestics in the borders of the State only. *McMillan v. City of Knoxville*, 319.

2. *Exemptions. Garnishment. Statutes. Construction.*

Under Acts 1905, chapter 376, section 2, providing for exemptions from attachment and garnishment of ninety per cent. if the income is less than \$40 per month, the words "per month" and "income" mean the aggregate income during any given calendar month. *Frazier v. Nashville Veterinary Hospital*, 440.

3. *Constitutional law. Officers. Removal from office. Proceedings. "Vacate." "Vacancy."*

Under ordinance providing that all officers of the city shall attend the regular meetings of the council, that any officer desiring to be temporarily absent shall apply to the mayor for leave, and that any officer who is absent without permission of the mayor shall thereby vacate his office, members of a board of commissioners could not, for temporary absence from the city without written authority of the mayor, be deprived of their offices without trial and opportunity to be heard, in view of constitutional guaranty of due process of law, since the word "vacate" cannot be given its technical meaning, the term "vacancy," as used in legal phraseology, meaning a place unfilled, and, when applied to our office meaning the state of being destitute of an incumbent or a want of a proper or legally qualified officer to officiate. *Ashcroft v. Goodman*, 625.

E 7 11 J

8/6/18



